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THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,
THE HIGH COURT OF JUSTICE,
THE COURT FOR CROWN CASES RESERVED,
IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY
WILLIAM GREEN,
BARRISTER-AT-LAW.

1901.

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Lord Chancellor.

The Right Hon. Lord Ashbourne.

Lords Justices of Appeal.

The Right Hon. Gerald FitzGibbon.
The Right Hon. Samuel Walker
The Right Hon. Hugh Holmes.

Master of the Rolls.

The Right Hon. Andrew Marshall Porter.

Vice-Chancellor.

The Right Hon. Hedges E. Chatterton.

Land Judge.

The Hon. John Ross.

Irish Land Commission.

The Hon. R. E. Meredith, *Judicial Commissioner.*
Frederick S. Wrench,
The Hon. Gerald FitzGerald, K.C.,
S. J. Lynch,
Murrogh O'Brien,
} *Commissioners.*

Attorney-General.

The Right Hon. John Atkinson.

Solicitors-General.

George Wright, K.C.
James H. Campbell, K.C.

[These Reports will be cited as follows :—[1901] 1 I. R.]

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Vice-Chancellor,	D. M‘C. Mahony, John MacMahon,	Barristers-at-law.
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NOTE.

The COURT OF APPEAL have reversed the decision of the VICE-CHANCELLOR in TEVLIN *v.* GILSENAN, [1901] 1 I. R. 429.

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1901.

IN THE MATTER OF THE ESTATE OF EDWARD VERNON, OWNER AND PETITIONER.

Ross, J.
1900.
April 30.
May 1, 2, 16.

Statutes of Limitation—Discontinuance of possession—User of land—Immunity of a Crown department from costs.

In 1819 portion of the Bull of Clontarf, a sandy tract in Dublin Bay, was taken from V.'s predecessor, by the Dublin Ballast Board, after an inquisition, and an award was made, containing a map on which the boundary between the land taken and V.'s land was stated. Some years afterwards three wooden posts were put by an officer of the Board in a line considerably outside the boundary, as shown on the map. As these posts decayed two walls, 21 feet long by 8 feet high, were built on their site. These were the only physical marks of a boundary. V.'s cattle grazed beyond them without interruption. In 1865 a portion of the land between the boundary on the map and the walls, and which had been previously fenced off, was leased by the Board to the Admiralty. In 1876 and 1884 the question as to the correct boundary was raised between the Board and V. In 1884 V. commenced an action against the Board, claiming damages for trespass, and an injunction. This action was never brought to a hearing:—

Held, that there had been no discontinuance of possession by V., and that he was entitled to the land between the boundary on the map and the posts, except that portion leased to the Admiralty.

Upon an objection by the Board of Trade claiming the foreshore, which was overruled:—

Held, that as the Board represented the Crown, and the case not falling within 18 & 19 Vict. c. 90, costs could not be given against them.

In re Dublin Wicklow and Wexford Railway Company; *Ex parte Jordan* (31 L. R. Ir. 1) not followed.

OBJECTIONS to final notice to tenants by the Dublin Port and Docks Board, the Board of Trade, and the Commissioners for executing the office of Lord High Admirals of the United Kingdom.

Several witnesses were examined on behalf of the Port and Docks Board, the Board of Trade, and the owner. The facts appear fully in the judgment.

Ronan, *Q.C.*, and *O'Connor*, *Q.C.* (with them *D. F. Browne*), for the Port and Docks Board:—

The boundary which the Port and Docks Board claim as the correct boundary, has been continuously marked out, first by the posts, and, since 1840, by the walls. We say, firstly, that this boundary was accepted and acted on by all the parties; and, secondly, that, having regard to the nature of the property, and the erection by the Board of these walls, and the other acts, title must be held to have been acquired, by adverse possession, by the Board against the Vernon family for a long period. The portion which was leased by the Board to the Admiralty in 1865 is actually bounded by one of the walls; and possession has gone and rent has been paid under that lease since then; and where a large tract of land is in dispute, acts of ownership of part are evidence of ownership of the entire. Mr. John E. Vernon attempted to claim the land in dispute in 1876, when the Board insisted on the boundary, as marked by the walls, and Mr. Vernon then took no steps to enforce his claim. Again, in 1884, Mr. Vernon proceeded no further with the action he commenced against the Board, after the defence was filed and discovery made. [They cited Pollock's Essay on Common Law, pp. 2, 30, 31, 33.]

J. H. Campbell, Q.C., and *Jefferson*, for Colonel Vernon, the owner:—

The contention of the other side amounts to this:—We bought certain property in 1819, and because we put up some posts, which did not exclude the Vernon family, we have obtained a title by the statute. But the posts were as ineffectual to make time run against Col. Vernon as they were to keep out the cattle. As to the non-continuance of the action in 1884, we did not want to contend with a public department. As to the coastguards' garden, it was a matter of courtesy between Mr. J. E. Vernon and the coastguards, and time does not run. We grazed every part of the Bull. The posts and walls did not exclude us from the land. The fact that the litigation was not proceeded with is a neutral fact, if the obstruction did not prevent us from the ordinary enjoyment of the land. We rely on *Littledale* v. *Liverpool College* (1), *Leigh* v. *Jack* (2), and *In re Duffy's Estate* (3).

As to the garden, if the Board have not established a claim to the land, the Admiralty cannot have established a claim to it, as they claim through the Board: *Agency Co.* v. *Short* (4); *Peakin* v. *Peakin* (5); *Sedden* v. *Smith* (6); *Reilly* v. *Thompson* (7). Blackburne's, C.J., judgment in *M'Donnell* v. *M'Kinty* (8) was approved of by the Judicial Committee in *Agency Company* v. *Short* (4), Darby and Bosanquet (2nd ed.), pp. 286–293.

J. F. Vesey Fitzgerald, for the Admiralty:—

We fenced in the garden in 1865, and have had actual possession ever since: *Doe* d. *Egremont* v. *Pulman* (9); *Sedden* v. *Smith* (6).

O'Connor, Q.C., in reply:—

The inference from the position of the posts, is that they were put down for the purpose of taking possession up to them. The building of the walls round the posts was further evidence of intention to take up possession. The leasing of the garden to the coastguards was another assertion of ownership by the Board. We rely wholly on the Statute of Limitations. The straying of Colonel Vernon's cattle does not prove an act of ownership. Cites *Tottenham* v. *Byrne* (1); *M'Donnell* v. *M'Kinty* (2).

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(1) [1900] 1 Ch. 19.
(2) 5 Ex. Div. 264.
(3) [1897] 1 I. R. 307.
(4) 13 App. Cas. 793.
(5) [1895] 2 I. R. 359.
(6) 36 L. T. R. 168.
(7) I. R. 11 C. L. 238.
(8) 10 I. L. R. 514.
(9) 3 Q. B 622.

C. E. MacDermot, for the Board of Trade, cited *Attorney-General* v. *Burridge* (3).

May 16.

Ross, J.:—

In this matter three objections to the Final Notice have been filed: one by the Port and Docks Board, one by the Admiralty, and one by the Board of Trade.

All these objections deal with a place known as the North Bull, a great sandy tract, which extends a long way out from Clontarf into Dublin Bay.

A considerable part of it consists of rough pasture. On the south or Dublin side of it a long breakwater has been constructed, called the Bull Wall. On the opposite or northern side of it there is a wire fence separating the part of the Bull belonging to this estate from the part of it that belongs to Lord Howth. The map attached to the final notice does not represent the Vernon property as coming up to the Bull wall. A long triangular strip is admitted to be the property of the Port and Docks Board, taken by them in 1819 under circumstances subsequently to be stated. The Port and Docks Board, however, claim a very much larger portion of the Bull adjoining what is admitted to be theirs, coloured yellow and marked "disputed."

I shall now deal with their objection, and at the same time that of the Admiralty.

In the year 1819 the Dublin Ballast Board, who were the predecessors of the Dublin Port and Docks Board, under their statutory powers, took up a portion of the Bull for the purpose of improving the port and building the Bull wall. An inquisition was held, and a sum of £450 3*s*. was assessed as the purchase-money to be paid by the Board to Mr. George Vernon, the then owner of the Clontarf Estate. To the award is attached a map showing the premises taken. The direction of the boundary line is stated in the body of the document. It runs from the Green Lanes in a south-east quarterly eastern direction by solar bearing to a point within a thousand feet northward of Poolbeg Lighthouse. The direction of this line is capable of accurate ascertainment. It has been proved to my satisfaction, and has been admitted by counsel for the Port and Docks Board, that this line exactly corresponds with the line on the map marking the southern boundary of the Vernon Estate. The disputed portion is north of this line, and according to the inquisition and award forms no part of the land taken by the Board in 1819. The Board therefore have no paper title whatever, and they can only assert a title founded on the Statute of Limitations. The true boundary is not shown by any physical boundary marks at present. It appears that more than sixty years ago some official of the Ballast Board put up three posts in a line, and this line produced would run on the north side of the disputed portion. Subsequently when these posts began to decay the Board built two walls, 8 feet high and 21 feet long, beside two of the posts. The walls are on the same line as that indicated by the posts. I have no doubt that this was done on the erroneous supposition that the land taken by the Board extended so far into the Vernon Estate. The official may not have been competent, or may have misunderstood his instructions; but I think he intended by these conspicuous signs to mark the boundary, and until comparatively recently the Board's officials believed that this was the true boundary. On the other hand, these posts and walls in no way prevented the owners of the Vernon Estate from using the Bull as before.

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(1) 12 Ir. C. L. R. 376. (2) 10 I. L. R. 514. (3) 10 Price, 350.

I now come to a matter which is dealt with in the objection of the Admiralty, as well as in the objection of the Port and Docks Board. In the year 1862 a coastguard station was built on the land of the Board, taken under the inquisition in 1819, and soon afterwards the men living at the station made a garden for growing vegetables. This garden, containing about five statute acres, which was subsequently fenced, extended out to the line of the posts. The outward boundary of the garden exactly coincides with the line intended to be marked by the posts. On the 8th of August, 1865, a lease of this plot was executed by the Port and

Docks Board to the Admiralty for a term of 99 years, at a rent of 5*s*. per annum. The map on the lease and the lease itself contain statements that the property bounding the garden on all sides except the north was the property of the Port and Docks Board. There is no evidence that Mr. John E. Vernon or Colonel Vernon, the present owner, were aware of the making of the lease. This, however, would make no difference. Mr. John E. Vernon was a retired naval officer, and was no doubt gratified that the coastguards should have the garden, which was of little value to him, and of considerable value to them. The garden was fenced off, and for more than thirty years there is no evidence of possession by any persons other than the coastguards. Here we have a complete case of a title, acquired under the Statute of Limitations. The rightful owner, Mr. Vernon, was excluded; his cattle no longer grazed on these five acres. He acquiesced in his own dispossession. The servants of the Admiralty cultivated the garden, and paid rent therefor to the Port and Docks Board. The objection of the Admiralty and the objection of the Board in respect of this garden must therefore be allowed.

The main question still remains affecting the rest of the disputed portion. The *onus* rests altogether on the Board. This is not the case of uncertain boundaries, such as we often find in the case of moors or mountain tracts, where the existence of boundary marks, wholly insufficient to prevent trespass, is of great importance in determining ownership.

Here the property belongs to the Vernon Estate, except the part actually defined in the award. There is no uncertainty whatever about the direction of that boundary line, though undefined by any physical marks. The question is:—Were the Vernons dispossessed of any land outside that line except the coastguards' garden? In the year 1876 the late John E. Vernon constructed a fence between his own portion of the Bull and that belonging to Lord Howth, as I have stated. He was anxious at the same time to have the boundary defined between his property and that of the Port and Docks Board. A letter was written by Mr. Franks, his solicitor, on the 1st of March, 1876, to Mr. Watson, solicitor to the Board, requesting that some person on behalf of the Board should attend with the maps to assist in marking out the boundary, as Mr. Vernon was about to make a wire fence. A reply was ultimately sent by the Board's Secretary to the effect that the Board could not assent to alteration of the boundary as marked out. By a further letter in 1876 from their Secretary the Board claimed to be entitled to the space marked out on the ground by existing landmarks, and not that shown by the map attached to the inquisition. Nothing very material occurred as between Mr. Vernon and the Board till the year 1884, when Mr. Franks wrote to the Secretary of the Board, requesting that a surveyor should be sent to meet Mr. Vernon's surveyor and mark out the boundary, and stating that if this were not agreed to Mr. Vernon would leave the matter in the hands of his own surveyor. On the 7th of July, 1884, Mr. Fitzgerald, Solicitor for the Board, replied that there were pillars marking out the land belonging to the Port and Docks Board, and that no good could be gained by going into the question of the boundaries, as the matter seemed to have been settled long ago. Shortly afterwards Mr. Franks and Mr. Vernon's men went on the ground, erected posts, and constructed a trench to mark out the boundary. The line so marked coincided with the line on the inquisition map. In the month of October the Board's servants removed the posts and filled up the trench. Then ensued some correspondence, in which the Board stoutly asserted that Mr. Vernon's posts and trench were on their ground, and insisted that the boundary was marked by the old posts and masonry. Mr. Vernon brought an action in the Exchequer Division, claiming damages for trespass and an injunction. The Board in their defence, among other defences, pleaded justification, and on that issue was joined. The action remains in that state to the present time. Mr. Vernon never served notice of trial, and the Board never moved to dismiss for want of prosecution, and never served notice of trial. I can perfectly understand the reason of both parties. Mr. Vernon did not find it desirable to enter on protracted litigation with a strong public body about property that was not very valuable, particularly when the posts and masonry did him no harm whatever, and his cattle were not interfered with. The Board, on the other hand, had no paper title, and not much of a case except as regards the coastguards' garden.

In the oral evidence taken before me at this hearing there has been hardly any contradiction. A man called Warren was a caretaker of the Board in about the year 1823. He resided on the Bull; his three sons, one of whom is 79 years of age, lived there when they were boys. They have proved the existence of posts so long as they remember, and a number of other facts that are admitted. One of them proved that his father had a donkey that grazed on the Bull. I do not believe that any cattle were there other than those of the owners of the Vernon Estate; and of these cattle there is no evidence whatever of any exclusion. Mr. John E. Vernon had his cattle there till his death in 1890; then the present owner, Colonel Vernon, kept cattle on it for a year. Since that time he has let it to Lord Ardilaun, whose cattle are on it at the present time.

A great number of authorities have been cited by the learned counsel on both sides. On the facts I can hardly see how any question of law can arise. The Board contend that the soil is taken from Mr. Vernon and is vested in them. To do this they must prove discontinuance of possession on the part of Mr. Vernon, and actual possession by themselves for the statutory period. Counsel for the Board strongly contended that the fact that Mr. Vernon's cattle grazed over the disputed portion was a neutral fact, because these cattle grazed over the portion admitted to be the Board's property. This illustrates the weakness of their whole argument.

To establish title to the land of another by acts of ownership a mass of evidence is required, going to show that the claimant dealt with the land as his own and excluded the former owner. But very little evidence is required to show that a rightful owner has not abandoned his property. In *Leigh* v. *Jack* (1), Bramwell, L.J., says:—"It is difficult to suppose a case where it can be doubtful whether there has been a discontinuance of possession as to a house. If any table or chair or other small article of furniture be left, there is strong evidence of an intention that there shall be no discontinuance of possession; but it is possible to conceive a case of discontinuance of possession as to a piece of land

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(1) 5 Ex. Div. 272.

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where the former owner does nothing to it for the space of twenty years." He goes on to show that this is a question of fact, and that the smallest act would be sufficient to show that there was no discontinuance. He states that the circumstance that within twenty years before suit the plaintiff repaired a fence on the premises was strong to show that there was no discontinuance. He then proceeds as follows:—"I do not think there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and his predecessors in title and vest it in the defendant. In order to defeat a title by dispossessing a former owner acts must be done which are inconsistent with his enjoyment of the soil, for the purposes for which he intended to use it." In the case in which this judgment was given the only act done by the plaintiff within twenty years before action was the repair of a gate or fence, yet this was held to be sufficient evidence to support the conclusion of fact that there was no discontinuance of possession. "To constitute discontinuance," writes Lord St. Leonards in his Treatise on the Real Property Statutes, "you must have dereliction by the person who has the right and actual possession, whether adverse or not, to be protected." Where was the dereliction in the case now before me? The proprietors of the Vernon estate and their lessee used the land exactly as they had used it before, by grazing their cattle on it. The posts did not prevent them; the walls did not prevent them; no attempt was made to follow up the destruction of Mr Vernon's boundary marks by the taking of actual possession or by an effective exclusion of his cattle. It would be a dangerous innovation in the law to lay down that one proprietor can oust another from his property by erecting boundary marks and by proclamation asserting title. There is no discontinuance without actual exclusion. An entry with title—that is with a right to possession—is a different matter that may amount to constructive possession. But here we have an entry on a few occasions by a trespasser without any claim to possession. This cannot, in point of law, confer title unless it becomes actual possession. For these reasons, I am of opinion that the objection of the Board, save in so far as they claim the lessor's interest in the lease of the coastguards' garden, must be overruled.

I come now to the objection of the Board of Trade who claim the foreshore or part of the foreshore.

This is not the first time that the Vernon family's title to the foreshore has been questioned. In the year 1873 Mr. John E. Vernon was called upon to put the proof of his title to the foreshore before the law officers of the Crown. The Letters Patent were laid before them. These contain words sufficient to convey the foreshore. The Patent of the 27th of King Charles II., after granting *inter alia* the Island of Clontarf to Edward Vernon, goes on to grant customs, anchorage, waters, weyres, fishings as well by land as by sea, creeks, land and sea shores, wrecks of the sea, and other privileges. A mass of evidence was put before the law officers showing continuous and unrestricted enjoyment of the foreshore down to that time. A letter from the Secretary of the Board was written to the effect that the law officers were satisfied that Mr. J. E. Vernon had established his title to the foreshore. The evidence is quite conclusive. Mr. Vernon kept a strand bailiff for the purpose of looking after these rights. Orders were issued by the agent to people desirous of taking sand and gravel; nobody was permitted to take more loads than those mentioned in the agent's permit. Numerous leases of the fisheries and oyster-beds have been put in evidence. Anchorage dues have been exacted. A low-built circular structure about a hundred yards below high water mark protects the shaft of a lead mine worked by the Vernon family or their lessees for many years.

It is said that an incorrect map was put before the law officers, and their admission goes no further than the boundary of the Vernon property shown on the map. It is plain from the correspondence, however, that the whole foreshore was the subject of dispute. I am satisfied, apart from any admission, that the foreshore passed to the Vernon family by the Patent, and has been enjoyed by them since.

In the year 1874, Mr. John E. Vernon proceeded by Bill of Complaint in Chancery for an injunction to restrain certain persons called Wade, and others, from raising sand, clay, or gravel from the foreshore. A decree was made by the Vice-Chancellor in 1875, and some persons were afterwards imprisoned for disobedience of it. I do not remember any case in which title to the foreshore has been so conclusively established. For these reasons I overrule the objection of the Board of Trade.

Jefferson asked for costs against the Board of Trade. Under 18 & 19 Vict. c. 90, preamble and sect. 2, the Crown are liable to pay costs. We are defendants here, at a suit by the Board of Trade; but the Board of Trade is not the Crown. In *In re Dublin, Wicklow, and Wexford Railway Co.; Ex parte Jordan* (1), costs were given against the Crown.

Even if we do not come under that statute, as the Board of Trade is not the Crown, they are liable to pay costs. The question was raised in *Reg.* (*Moore*) v. *Abbott* (2), but the Court of Appeal refrained from deciding it.

C. E. Mac Dermot:—

Ex parte Jordan (1) was not followed by Boyd, J., in *In re Galwin* (3)—We rely on *Reg.* v. *Beedle* (4). The Court is bound to hear the Board of Trade's objection, but its power of giving costs is limited; the Crown can neither ask for costs or pay them.

Ross, J.:—

I have been asked to give costs against the Board of Trade. I am of opinion that the Board of Trade, while claiming the foreshore on behalf of the Crown, represent the Crown. I should certainly give costs against the Crown in this case, if I had the power. I have no power to give costs against the Crown, unless authorised by statute. I am of opinion that the statute relied on does not apply. In order to enable an appeal to be taken by the parties, I shall preface my order by a statement that the Court is of opinion that there is no power in it to give costs against the Crown. I do so because this decision does not apparently follow a decision of a most eminent Judge, for whose opinion all Courts

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(1) 31 L. R. Ir. 1.

(2) [1897] 2 I. R. 362, 415.

(3) [1897] 1 I. R. 525.

(4) 7 E. & B. 492.

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in the Kingdom have the utmost respect. I give express liberty to appeal on the question of costs (1).

Solicitor for the Port and Docks Board: *Edward Fitzgerald.*

Solicitor for Colonel Vernon: *T. C. Franks.*

Solicitor for the Admiralty: *Lane.*

Solicitors for the Board of Trade: *Hallowes & Hamilton.*

W. C. S.

Ross, J.
1900.
July 4, 5, 24.

IN RE LAMBERT'S ESTATE.

Power—Execution—Joint power of appointment given to father and son—Contingent sole power of appointment given to son if surviving—Covenant by son to exercise sole power—Subsequent exercise of joint power by father and son—Defective execution of power—Mortgage subject to certain charges "so far only as they affect the land."

By a disentailing deed, executed and enrolled in 1862, lands were limited to such uses as A and B, during their joint lives, should by deed appoint, and, in default of such appointment, to such uses as B, if he should survive A, should, after the death of A, by any deed made after the decease of A, appoint, and, in default of such appointment, to such of the uses of a certain settlement as were subsisting before the execution of the disentailing deed, under which B took an estate tail.

In 1868, B, by a deed of arrangement with his creditors, covenanted that in case he survived A, and came into possession of the premises, he would grant and appoint the lands, by way of mortgage, to trustees to secure the sum of £2010, the aggregate sum due to his creditors.

In 1872, A and B, in exercise of their joint power, mortgaged the lands to the petitioners, it being stated in the mortgage that the security thereby created was to be subject to several charges, including the sum of £2010, secured by the deed of 1868, "so far as the same are now subsisting and capable of taking effect, and so far only as they affect" the lands.

In 1880, A and B, in further exercise of their joint power, by deed mortgaged the lands to M, subject to the charges and incumbrances mentioned in the schedule to the deed (which included the deed of 1868), but not so as to give the same, or any of them, any greater or other priority, lien, or security than they respectively had. A having died in 1898:—

Held, that the deeds of 1872 and 1880, made under the joint power of

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(1) A similar decision was arrived at by the Queen's Bench Division in *The Secretary of State for War* v. *Booth* (Trin. Sittings, 1900; *Ex rel.* Mr. W. G. Jefferson).

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A and B, took priority to the deed of 1868, made under the sole contingent power of B, though the latter was earlier in date, and the mortgagees in the subsequent deeds had notice thereof.

MOTION to vary the examiner's report as to the priorities in which the receiver should apply the rents, from time to time, in his hands.

At the date of the disentailing deed, hereinafter mentioned, the lands of Aggard in the county Galway, were, with others, by virtue of a marriage settlement, executed February 1, 1833, limited to John Walter Henry Lambert for life, with remainder to his eldest son, Thomas Walter Lambert, in tail male, subject to a charge of £2000, as and for portions for the younger children of John Walter Henry Lambert, and the lands of Ballyardigan in the county Galway were, with others, by virtue of the will of Walter Lambert, dated September 3, 1832, and proved May 5, 1835, settled on John Walter Henry Lambert for life, with remainder to his eldest son, Thomas Walter Lambert in tail male, subject to a power given to John Walter Henry Lambert to charge the same with £3000 as and for portions for his younger children.

By a disentailing deed dated the 31st October, 1862, and duly enrolled, Thomas Walter Lambert, with the consent of John Walter Henry Lambert as protector of the settlement, granted unto Cuthbert Fetherston Lambert, the several lands comprised in the said marriage settlement and in the said will, "TO HOLD the said premises freed and discharged from the estate in tail male of the said Thomas Walter Lambert therein, and from all estates, rights, titles, and powers to take effect after the determination or in defeasance of such estate tail, subject and without prejudice to the said estate for life of the said John Walter Henry Lambert, and to such of the powers and privileges thereto annexed or exercisable during the continuance thereof, as were then subsisting and capable of being exercised UNTO the said Cuthbert Fetherston Lambert and his heirs, nevertheless to such uses, upon and for such trusts, intents, and purposes, and with and under and subject to such powers, provisoes, limitations, charges, declarations, and agreements, and generally in such manner and form, in all respects, as the said John Walter Henry Lambert and Thomas Walter Lambert should, from time to time, at any time thereafter during their joint lives by any deed or deeds, with or without power of revocation, jointly appoint, AND in default of such joint appointment, and so far as any such should not extend, to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, limitations, charges, and agreements, and generally in such manner and form, in all respects, as the said Thomas Walter Lambert, in case he should survive the said John Walter Henry Lambert, should from time to time, or at any time or times after the decease of the said John Walter Henry Lambert, by any deed or deeds made after the decease of the said John Walter Henry Lambert, with or without power of revocation and new appointment, appoint, AND in default of such appointment, as last aforesaid, and so far as any such should not extend, to such and the same uses, and upon and for such and the same trusts, intents, and purposes, and with and subject to such and the same powers, provisoes, limitations, agreements, and declarations, as were subsisting in the said hereditaments thereby granted and conveyed immediately before the execution of this present indenture, and in all respects as if the said presents had not been made."

By an indenture dated the 4th July, 1868, and made between Thomas Walter Lambert of the first part, Thomas Henshaw, J. B. Johnstone, and James Forbes, creditors of the the said Thomas Walter Lambert of the second part, and several other creditors of the said Thomas Walter Lambert in schedule described, of the third part, and Christopher St. George of the fourth part, reciting the settlement of the 1st February, 1833, and the will of Walter Lambert, and reciting the disentailing deed of the 31st October, 1862, and reciting that Thomas Walter Lambert, being indebted to the several parties thereto of the third part in the aggregate sum of £2010 12*s.* 1*d.*, had proposed to effect a policy on his life for the sum of £2500, and had agreed to assign same to the parties of the second part as trustees for the parties of third part, "so that in the event of the death of Thomas Walter Lambert in the lifetime of John Walter Henry Lambert, the proceeds of the policy of insurance would be available for the payment and discharge of his said liabilities, together with interest thereon respectively, at the rate of £5 per cent. per annum, so far as the same might extend to the payment of such interest, And further, that he the said Thomas Walter Lambert would enter into a covenant with the said parties hereto of the second part as such trustees aforesaid, to the effect that in case he should survive the said John Walter Henry Lambert and should come into possession of the lands, premises, and hereditaments in the said recited settlement of the 1st day of February, 1833, and the said will of the said Walter Lambert, and hereinafter respectively mentioned, and into receipt of the rents and profits thereof, he would, within one month thereafter, charge the same lands, premises, and hereditaments with the said sum of £2010 12*s.* 1*d.*, being the aggregate amount of the debts so due and owing to the parties hereto of the third part, together with interest on the said several sums respectively, at the rate of £5 per cent. per annum, to be computed from the day of the date hereof, to which the said parties hereto of the third part have respectively agreed upon having the payment of the sum of £32 10*s.* per annum, the amount of the annual premium payable on the said policy so to be effected secured in manner hereinafter mentioned," And reciting that Christopher St. George had agreed to covenant in manner thereinafter mentioned, to secure the payment of the said premium of £32 10*s.* per annum, And reciting that for the purpose of giving effect to the said agreement, the said Thomas Walter Lambert had effected an assurance with the Liverpool, London, and Globe Insurance Co. in the sum of £2500, payable on his death, provided same should happen during the lifetime of John Walter Henry Lambert by a policy dated the 9th January, 1868, No. 21,719, and under the annual premium of £32 10*s.* The said indenture witnessed that Thomas Walter Lambert assigned said policy to the trustees, to hold upon the trusts therein, *e.g.* out of the moneys received thereunder, first, to pay costs and expenses, and, in the next place, to pay all the residue of the said moneys in payment of the debts owing by Thomas Walter Lambert to such of his creditors as should execute the said presents rateably and in proportion to the amount of the debts owing to them respectively, without any priority or preference, nothwithstanding any legal priority or preference which might subsist "until each of the said creditors, or his or her executors, administrators, partners or assigns shall have received the full amount of the debts, owing to him, her, or them respectively, together with interest for the same after the rate of £5 per cent. per annum from the day of the date of these presents to the time of payment thereof respectively." Then followed covenants for keeping up the policy and other provisions not necessary to set out in this report, and finally came a covenant by Thomas Walter Lambert in the words following:—"AND THIS INDENTURE FURTHER WITNESSETH that for carrying the said agreement into more effectual execution and for the considerations aforesaid, he the said Thomas Walter Lambert doth hereby for himself, his heirs, executors, and administrators covenant, promise, and agree with the said Thomas Henshaw, John Brown Johnstone, and James Forbes, and the survivor of them, and the executors and administrators of such survivor and his assigns, that in case he the said Thomas Walter Lambert should survive the said John Walter Henry Lambert, and become thereby entitled to and enter into possession of the lands, premises, and hereditaments hereinafter mentioned, and into receipt of the rents and profits thereof, that within one calendar month thereafter, he the said Thomas Walter Lambert will grant and appoint the said lands, premises, and hereditaments (that is to say): ALL THAT AND THOSE, etc." (being the lands comprised in a certain indenture of settlement of the 1st day of February, 1833); "AND ALSO ALL THAT AND THOSE, etc." (being the lands and hereditaments comprised in and devised by the will of the said Walter Lambert, deceased), "with their respective appurtenances, UNTO and TO THE USE of the said Thomas Henshaw, John Browne Johnstone, and James Forbes, and the survivor of them, and the executors and administrators of such survivor, their and his assigns, or other the trustees for the time being of these presents, subject to redemption on payment of the said sum of £2010 12*s.* 1*d.* and interest thereon at the rate of £5 per cent. per annum."

By an indenture of mortgage dated the 20th December, 1872, and made between John Walter Henry Lambert of the first part, Thomas Walter Lambert of the second part, K. H. Hallowes of the third part, William P. Smith and Francis Ellis of the fourth part, and E. de Z. Argles of the fifth part, reciting amongst other things the marriage settlement of the 1st February, 1833, the will of Walter Lambert, the disentailing deed of October 31st, 1862, an indenture of June 16th, 1865, whereby an annuity of £213 0*s.* 6*d.* was charged on the lands for the life of John Walter Henry Lambert, and reciting that William Peters Smith and Francis Ellis had agreed to lend John Walter Henry Lambert and Thomas Walter Lambert the sum of £10,346 13*s.* 4*d.*; and further reciting that:—"Upon the treaty for the said loan it was agreed by and between the parties hereto that these presents should be made subject to the following charges, so far as the same are now subsisting and capable of taking effect, and so far only as they affect the several lands, tenements, and hereditaments hereafter expressed to be hereby limited, granted, and assured, namely, the sum of £2000 charged as and for the portions of the younger children of the said John Walter Henry Lambert, in and by the said indenture of the 1st February, 1833, the sum of £3000, which the said John Walter Henry Lambert has power to charge as and for additional portions for the younger children under the provisions of the said will of the said Walter Lambert, the annuity created by the said deed of the 16th June, 1865, and to the sum of £2010 12*s.* 1*d.*, and interest thereon, secured by an indenture of mortgage bearing date the 4th July, 1868, and made between the said Thomas Walter Lambert of the first part, Thomas Henshaw, John Browne Johnstone, and James Forbes of the second part, several creditors of the said Thomas Walter Lambert, whose names and seals are subscribed and affixed to the schedule thereto annexed of the third part, and Christopher St. George of the fourth part": the said John Walter Henry Lambert and Thomas Walter Lambert covenanted in consideration of the sum of £10,346 13*s.* 4*d.* then advanced by the mortgagees to repay the same with interest in the usual form. And the said indenture further witnessed that in further pursuance of said agreement, and for consideration aforesaid, in exercise of the joint power of appointment to them for this purpose given by the said deed of the 31st October, 1862, and of every other power, &c., the said John Walter Henry Lambert and Thomas Walter Lambert thereby jointly directed, limited and appointed that, first, all and singular the lands comprised in the indenture of 1st February, 1833;

and, secondly, all and singular the lands devised by will of Walter Lambert should thenceforth remain and be to the use of William Peters Smith and Francis Ellis, their heirs and assigns for ever. "And as to all the said lands and hereditaments hereinbefore described and expressed to be hereby appointed and granted, subject, so far as they respectively affect the same, to the said several sums of £2000 and £3000, portions for the younger children of the said John Walter Henry Lambert; to the hereinbefore recited indenture of the 16th day of June, 1865, and the said annuity of £213 0*s.* 6*d.* thereby granted, and to the said indenture of mortgage of the 4th July, 1868, and the sum of £2010 12*s.* 1*d.* thereby secured. And subject also to the proviso for redemption hereafter contained." And the said indenture also witnessed that in further pursuance of said agreement, and for considerations aforesaid, the said John Walter Henry Lambert and Thomas Walter Lambert, according to their several and respective estates, granted and confirmed unto the said William Peters Smith and Francis Ellis, their heirs and assigns, all and singular the said lands, to hold the same to the said William Peters Smith and Francis Ellis, their heirs and assigns, subject as aforesaid.

There followed covenants by John Walter Henry Lambert and Thomas Walter Lambert for right to convey and for further assurance, and a proviso for redemption on repayment of £10,346 13*s.* 4*d.*, with interest at £5 10*s.* per cent., and for reconveyance of said premises, first and secondly mortgaged "to the uses and upon the trusts, to and upon which the equity of redemption of the premises shall for the time being stand limited and settled, but subject to the charges subject to which the said premises are hereinbefore expressed to be hereby appointed and granted, or such of them as shall be then subsisting."

Thomas Walter Lambert was adjudicated a bankrupt on the 20th September, 1878, and carried an arrangement in the bankruptcy matter.

By a further deed, dated the 25th May, 1880, executed and enrolled as a disentailing assurance, and made between John Walter Henry Lambert of the first part, Thomas Walter Lambert of the second part, and John Henry Lambert of the third part, reciting that previous to the indenture next recited, the hereditaments therein described stood limited to the use of John Walter Henry Lambert for life, with remainder to the use of his first and other sons in tail male; and reciting the disentailing deed of 31st October, 1862; and reciting bankruptcy of Thomas Walter Lambert, the composition therein, and an indenture of the 25th May, 1880, whereby the property of the bankrupt was revested in him; and reciting that doubts had been entertained as to the effect the said adjudication in bankruptcy might have had upon the powers given to the estates created by the disentailing deed of the 31st October, 1862, and it had been considered advisable to execute said indenture intended to be enrolled as a disentailing assurance to remove any such doubts, and to restore or renew with variations thereinafter contained the uses and trusts and powers of the said indenture of the 31st October, 1862, THE SAID INDENTURE WITNESSED that to effectuate such desire, and in consideration of the premises, the said John Walter Henry Lambert and Thomas Walter Lambert, by virtue of the power in the deed of the 31st October, 1862, and all other powers, etc., appointed that the hereditaments therein should thenceforth remain and be (subject as in the said indenture of the 31st October, 1862, expressed) to the uses thereinafter declared; and the said indenture also witnessed that for the purpose and consideration aforesaid John Walter Henry Lambert, as to his estate for life, and Thomas Walter Lambert, as to the remainder in fee expectant on such life estate, and with the consent of John Walter Henry Lambert as protector, thereby granted unto the said John Henry Lambert, and his heirs, the lands comprised in the said marriage settlement of the 1st February, 1833, and in the will of Walter Lambert, TO HOLD the same UNTO THE USE of the said John Henry Lambert, his heirs and assigns, without prejudice to the charges and incumbrances affecting the same, but not so as to give them any greater or other validity or priority, and subject to all uses (other than the estate for life of John Walter Henry Lambert) subsisting in said premises immediately before the indenture of the 31st October, 1862, but freed from all estates tail of Thomas Walter Lambert; and the said indenture contained a declaration that the appointment and grant thereinbefore contained should operate and enure to such uses as the said John Walter Henry

Lambert and Thomas Walter Lambert should jointly appoint, and in default of such joint appointment as Thomas Walter Lambert, in case he should survive John Walter Henry Lambert, should appoint, and, in default, to such uses as were subsisting prior to the indenture of the 31st October, 1862.

By indenture of mortgage, dated the 25th May, 1880, and made between John Walter Henry Lambert and Thomas Walter Lambert of the one part, and Sarah Jane M'Causland, Catherine Anne M'Causland, and Charlotte M'Causland of the other part, reciting the disentailing deed of the 25th May, 1880, and reciting an agreement for a loan of £1400, the said indenture witnessed that John Walter Henry Lambert and Thos. Walter Lambert covenanted to repay £1400 principal, and interest; and the said indenture also witnessed that in further pursuance of the said agreement, and for the consideration aforesaid, they the said John Walter Henry Lambert and Thomas Walter Lambert, in exercise of the power given by the recited indenture and all other powers, etc., thereby appointed, that the lands therein comprised should thenceforth go, remain, and be, to the use of the mortgagees, their heirs and assigns, subject to the charges and incumbrances mentioned in the schedule thereto, but not so as to give same, or any of them, any greater or other priority, lien, or security than at present they respectively had, and subject to the usual proviso for redemption, and the reconveyance to be "subject to the charges and incumbrances subject to which this appointment is made, to the uses of the disentailing deed of the 31st October, 1862."

The schedule to this deed set forth the charge for younger children, created by the settlement of the 1st February, 1833, £2000; the same, under the will of Walter Lambert, £3000; the mortgage, 20th December, 1872, £10,346 13*s*. 4*d*.; the annuity, £213 0*s*. 6*d*., payable only during life of John Walter Henry Lambert; the mortgage of the 4th July, 1868, whereby Thomas Walter Lambert covenanted, that in case he survived his father he would charge his estate with a sum of £2010 12*s*. 1*d*.; and some other incumbrances not necessary to mention.

The mortgagees in the mortgage of the 20th December, 1872, presented a petition for sale of the lands, and a receiver was appointed.

John Walter Henry Lambert died in the year 1898, having exercised the power of charging the lands devised by the will of Walter Lambert in favour of his younger children, of whom there were several. Questions having arisen as to the priority in which the receiver should apply the rents of the lands, the Land Judge referred it to the Examiner to report on the priority of the several charges affecting the estate.

The Examiner having by his report set forth the priorities of the several above-mentioned deeds, according to their respective dates: the petitioners served notice to vary the report by declaring that the mortgages executed by John Walter Henry Lambert and Thomas Walter Lambert were entitled to priority over the creditors' deed executed by Thomas Walter Lambert on the 4th day of July, 1868.

S. L. Brown, Q.C., and *Dixon*, for the petitioners :—

The powers of appointment conferred by the disentailing deed of 1862 are very specific, viz. during the joint lives of the father and the son they had a joint power of appointment; after the death of the father the son had, in case he survived the father, a power of appointment, to be exercised by a deed made after the death of the father. Purchasers for value, under an execution of the joint power, are entitled to priority over those claiming under the sole power of the son, though the equity of the latter arises under a deed of earlier date. By the deed of 1868, the son does not purport to execute any power of appointment conferred on him by the disentailing deed; he covenants that when his sole power arises, he will exercise it in favour of his creditors. This deed plainly shows no intention on the part of the son to execute his power forthwith; therefore it is not such a defective execution of the power at that date as the Court will aid: this deed was not an attempt or act done by the son in or towards the execution of his power; on the contrary, it says that the time has not yet come for the donee to exercise his power; but that, when and if that time does come, he will then exercise the power; he intended to exercise the power by a future deed; it is impossible to treat his covenant so to do as a present execution: *Reid* v. *Shergold* (1).

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(1) 10 Ves. 370.

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1900.
In re LAMBERT'S ESTATE.

Time was one of the essential conditions of due execution in this case: the power did not arise till John Walter Henry Lambert was dead, and it was to be exercised by a deed made after his death: *Cooper* v. *Martin* (1); *In re Borrowes* (2). Even in cases where the Court aids a defective execution of a power it only gives operation to a disposition in the form in which the donee of the power is allowed to execute it: the Court will not make the instrument which it aids more effectual than the donee has power to make it: *Blake* v. *Marnell* (3).

Thomas Walter Lambert could not affect the lands during his father's life by any appointment which he might attempt to make under his sole power. After his father's death he can do nothing to postpone appointments made by his father and himself in exercise of their joint power.

In *Wandesforde* v. *Carrick* (4) it was held that a contingent power might be executed before the contingency happened; but it was treated as valid only on the happening of the contingency: so here, equity may treat the covenant given by Thomas Walter Lambert to exercise his contingent sole power as a valid execution of that power; but if it does, it will deem the power effective only from the happening of the contingency, *i.e.* from the death of John Walter Henry Lambert.

The recital in the mortgage of 1872 of an agreement that it was to be made subject to the several charges (including the £2010 12*s.* 1*d.* secured by the deed of 1868) "so far *only* as they affect" the premises, cannot postpone the petitioners' incumbrance to the deed of 1868: this agreement gave no priority which did not exist already to any of the incumbrances which it mentions: it was framed for this very purpose: *Doolan* v. *Smith* (5).

The deed of 1868 cannot affect Thomas Walter Lambert's estate tail contingent on the non-execution of the powers given by the disentailing deed; the covenant is not a grant or conveyance; it is simply a contract; no contract by a tenant in tail affects his estate: see sections 40 and 47 of the Abolition of Fines and Recoveries Act.

(1) L. R. 3 Ch. 47.
(2) I. R. 2 Eq. 468.
(3) 2 B. & B. 35.
(4) I. R. 5 Eq. 486.
(5) 3 J. & L. 547.

Thomas Walter Lambert did not derogate from the grant or covenant in the deed of 1868 by joining with his father in the mortgage of 1872. In 1868 he had three distinct interests in the lands; 1, a power of appointment to be exercised *in præsenti* jointly with his father; 2, a contingent power of appointment to be exercised when, and if, he survived his father; 3, an estate contingent on the non-execution of both the foregoing powers. The deed of 1868 only affected the second of these interests; it left the first and third unfettered. Had the deed of 1868 contained a covenant by Thomas Walter Lambert not to join his father in jointly appointing the lands—if such a covenant could be treated as valid and were not a fraud on the power—different equities would have arisen. But the mortgage of 1872 is based solely on the exercise of the joint power, and there was nothing to prevent Thomas Walter Lambert joining with his father in executing it.

Serjeant Dodd, and *Oulton*, for the creditors claiming under the deed of 1868:—

By executing the deed of 1868, Thomas Walter Lambert bound all the estate and interest he had in the lands. In equity a covenant to execute a power will be aided so as to make it a valid execution of the power. "What stronger declaration of an intent to execute a power can there be than a contract which makes the party liable to damages for not executing it?" asks Lord Redesdale in *Shannon* v. *Bradstreet* (1). It makes no difference that the power of Thomas Walter Lambert to execute the appointment was contingent on his surviving his father: a contingent power may be validly exercised before the contingency happens: *Wandesforde* v. *Carrick* (2). All the subsequent mortgagees took with notice of this deed, and from the moment John Walter Henry Lambert died their incumbrances must be postponed to that of our clients. A covenant to exercise a power charging lands when they come into possession binds the lands without the power being actually executed: *Affleck* v. *Affleck* (3); *Jackson* v. *Jackson* (4). It does not affect the question that Thomas Walter Lambert's sole power was to be exercised by a deed made after his father's death; where a woman was given a power of appointment over certain property, after attaining the age of twenty-five years, "and not before," and the donee on reaching the age of twenty-three, covenanted to exercise the power on reaching the prescribed age, which age she reached, but died without executing the power, the Court held this was an equitable exercise of the power: *Johnson* v. *Touchet* (1). Therefore the effect of the deed of 1868 was to give a charge on the lands which would spring up necessarily the moment John Walter Henry Lambert died; it bound the land from the day when it was executed, and could not be defeated by Thomas Walter Lambert executing, or joining his father in executing, any other power. Even if he had joined his father in making an absolute conveyance for value under the joint power this could not defeat the persons claiming under the deed of 1868: *Alexander* v. *Mills* (2); *Cooper* v. *Slight* (3).

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(1) 1 Sch. & Lef. p. 63.

(2) I. R. 5 Eq. 486.

(3) 2 Sm. & G. 394.

(4) 4 Bro. C. C 462.

The recital of the deed of 1868 in the petitioners' and the subsequent mortgages as creating a charge on the premises is a sufficient execution of the power by father and son in favour of our clients: *Lees* v. *Lees* (4). It ratifies the earlier deed, and makes the subsequent charges subject to it expressly. The words "so far only as they affect" the lands mean so far as they are not paid off—it was to be a matter of account between mortgagor and mortgagee.

Law, Q.C., for Miss M'Causland:—

In every case cited by Serjeant Dodd, where a defective execution was aided, there was an intention to exercise the power: here there was no such intention.

The mortgage of 25th May, 1880, though it recognises the existence of the deed of 1868, is expressly framed so as to give it no greater or other priority, lien, or security, than it had at law. The deed of 1880 is more accurately framed in this respect than the petitioners' mortgage. If it should turn out that the other charges mentioned in the deed have no priority, the deed itself gives them none: *In re Annaly's Estate* (1).

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(1) 16 W. R. 71.

(2) L. R. 6 Ch. 124.

(3) 27 Ch. D. 565.

(4) I. R. 5 Eq. 549.

Cherry, Q.C., for other mortgagees in the same interest as the petitioners.

[They cited also *King* v. *King* (2); *Minchin* v. *Minchin* (3).]

Cur adv. vult.

Ross, J.:— July 24.

The matter comes before me on a motion to vary the Examiner's report settling the priority of the incumbrances on the lands ordered to be sold.

Prior to the year 1862, under a title to which I need not in particular refer, John Walter Lambert was entitled to these lands as tenant for life, with remainder to his son Thomas Walter Lambert as tenant in tail.

On the 21st October, 1862, father and son joined in a deed, to bar the estate tail, the effect of which is shortly as follows:—The estates were granted in the usual way to a trustee, to hold, discharged from the estate tail, without prejudice to the father's life estate, and subject to a joint power of appointment in the father and son, and in default of such joint appointment, and so far as such joint appointment should not extend, to such uses as the son, in case he should survive his father, or at any time after the decease of his father, by deed or deeds made after the decease of his father, should direct or appoint. In default of appointment the lands were to be held on the trusts existing prior to the deed. It appears that Thomas W. Lambert, being in embarrassed circumstances, executed a deed, dated the 4th July, 1868, in favour of his creditors.

This deed recites the title to the lands in John W. Lambert and Thomas W. Lambert prior to the disentailing deed of 1862. It then recites the last-mentioned deed, and in particular sets out the joint power of appointment in father and son during their joint lives, followed by the power of appointment in the son to be exercised in the way, in the event, at the time, and to the extent, mentioned in the deed of 1862. It goes on to recite that the son T. W. Lambert is indebted in the sum of £2010 12*s.* 1*d.* to the creditors mentioned in the schedule, that he was unable to discharge this debt, and had proposed to his creditors to effect a policy on his life of £2500, and to assign it to the trustees mentioned in the deed, so that in the event of the death of the son in the lifetime of the father the proceeds of the policy would be available for the discharge of the said liabilities; and further, that he would enter into a covenant with the trustees to the effect that, in case he should survive his father and should come into possession of the lands, he would within a month thereafter charge the lands with the sum of £2010, with interest at 5 per cent., from the date of the deed. It then goes on to recite that an assurance had been effected for £2500, payable upon the death of the son, provided the same should happen during the lifetime of his father. The operative part of the deed contains an assignment of the policy, and a covenant by Thomas Walter Lambert following the recital, that in case he should survive his father he would appoint the lands unto and to the use of the trustees within a month after coming into possession, subject to redemption on payment of the aggregate debt and interest. The deed was registered on the 19th May, 1870, and is No. 3 in the schedule to the Report. On the 20th December, 1872, the father and son exercised their joint power of appointment by creating a charge of £10,346 13*s.* 4*d.*, which is now vested in Messrs. M'Mahon & Son, and is No. 4 in the schedule. No. 5 is a mortgage of the 11th December, 1873, and is executed by both father and son. No. 6 is a mortgage of the 3rd March, 1876, and is executed by both father and son. No. 7 is a mortgage of the 15th May, 1880, and is executed by the son only. No. 8 is a mortgage of the 25th May, 1880, and is executed by both father and son. No. 9 is a mortgage of the 25th May, 1880, and is executed by both father and son, but registered later than No. 8. The main question I have to decide is whether No. 3, executed by the son alone during his father's lifetime, creates a charge in equity, taking priority over those created by the subsequent deeds executed by both the father and son, in pursuance of the joint power of appointment. At first sight the question would appear to be simple enough. Thomas W. Lambert has first a power of appointment, to be exercised jointly with his father, and secondly a power of appointment, to be exercised by himself alone. The latter power is only operative in default of the joint appointment, and only effectual in so far as the joint appointment does not extend, and is only to be exercised after the death of the father and by a deed or deeds made after the decease of the father. As regards the exercise or non-exercise of the power of joint appointment the deed is silent; and in respect of it Thomas W. Lambert seems to be left unbound by any stipulation.

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(1) 23 L. R. Ir. 481. (2) 13 L. R. Ir. 531.
(3) I. R. 5 Eq. 178, 258.

As regards the exercise of the power to appoint alone, which arises only under the circumstances above mentioned, the deed contains a covenant to exercise it in case the conditions occur. The creditors are protected by the policy in case the son dies before his father, and in case he survives him he is bound to give them a charge on the lands. It would appear to be probable that the creditors thought that sufficient interest in the estate would remain in the son, independent of the exercise of the joint power of appointment, to satisfy the amount of their claim. The deed of the 4th July, 1868, does not purport to create a present charge on the lands, it merely contains a covenant to create a valid charge, at a future time, namely, only on the father's death.

The contention, on the other hand, is that, on the execution of the deed of 1868, a valid charge was created, binding the lands as from that date—as soon as the event occurred which made it operative.

The theory upon which the contention rests, is that covenants to execute a power, on the happening of an event, may be treated as a defective execution of the power, which, under certain circumstances, the Courts will aid. Numerous cases have been relied on in which this has occurred.

In *Wandesforde* v. *Carrick* (1), the Vice-Chancellor lays down that when a power is given to a designated person, it may be executed before the happening of the contingency, and the execution will be valid on the subsequent happening of the event.

(1) I. R. 5 Eq. 486.

In *Jackson* v. *Jackson* (1), a father who was tenant for life, and a son who was tenant in tail, covenanted that the son, when in possession, would create a jointure, as he had power to do. The father died, the son entered into possession, but died without making any settlement. The estate was held bound in the hands of the remainderman.

In *Coventry* v. *Coventry* (2) (as reported in the end of Maxims in Equity) the opinion of Sir Joseph Jekyll is strongly expressed:—"Since the statute, if *cestui que use* for life, with a power covenants for a valuable consideration to execute his power, and in the execution it proves defective, this Court aids the execution of it, and makes it effectual. Nay, further, if he does not execute his power at all, this Court, I conceive, ought to decree an execution of that covenant, as it would of any other covenant for a consideration, and compel him to execute his power. For as the justice of the Court makes good a defective execution against the remainderman, so, if the tenant for life dies before the execution, I conceive there is the same justice due to the purchaser against the remainderman, after his remainder takes place, as there was before, for by the covenant the purchaser has a lien upon the estate into whose hands soever it comes." This is an exposition of the law, so clear that it becomes unnecessary to go particularly through the other cases.

But as from what date will the Court enforce the lien or charge? On the one side it is said that, as from the date of the covenant, it becomes a contingent charge, on the other side, it is said that it is only from the occurrence of the event that makes it operative, that it binds the land.

In *Affleck* v. *Affleck* (3), where a husband who had covenanted to create a jointure, charged upon his real estate, on coming into possession, became of unsound mind before coming into possession, the covenant was enforced against the remainderman. Although the point of time was not very material, Vice-Chancellor Stuart says:—"The Court acts on the principle that the covenant, as a defective execution of the power, *affects and binds the land as soon as the time arrives at which the covenantor has*

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(1) 4 Bro. Ch. Cas. 462. (2) 2 P. W. p. 222. (3) 2 Sm. & G. 394.

authority to bind the land." Further he, no doubt, states that "if the covenant is to have any effect at all, it operates from the moment of its execution." I cannot think he means that it operates as a charge on the land, from the moment of its execution. What he does mean in his own words is *when the covenantor comes into possession of his estate*, if the covenant be valid, it is, in itself, such an execution of the power as will be made good by the settled rules of this Court. As the point of time at which the covenant became operative as a charge was not involved in the decision of that case, it is hardly fair to press this construction of the words used in the judgment too far. The same observation is applicable to *Johnston* v. *Touchet* (1). I think, on the special facts of this case, the difficulty, to a great extent, disappears.

The deed of 1868 recites the power of joint appointment and then the power of appointment in the son in default of joint appointment and *in so far as* such joint appointment shall not extend. It was his single power as survivor he covenanted to execute. His single power is only operative *in so far* as the exercise of the joint power of appointment left it anything to operate upon.

The next contention put forward in favour of charge No. 3 was that every subsequent exercise of the joint power of appointment was in derogation of the covenant in the deed of 1868. In support of this proposition, *Alexander* v. *Mills* (2) is relied on. There the trustees of a settled estate had a power of sale, to be exercised at the request and direction of a tenant for life, who was also entitled to the ultimate reversion in fee, and who had made an absolute conveyance of all his interest for value; it was held that the power of the tenant for life to consent was not extinguished by the absolute alienation of his life estate, but could still be exercised with the concurrence of the alienee. It seems to have been assumed in the case that the concurrence of the alienee was essential.

In *Eisdell* v. *Hammersley* (3) a power given to trustees to sell realty with the consent of the tenant for life was held exercisable after his bankruptcy; but again it appears that the consent of the

(1) 16 W. R. 71. (2) L. R. 6 Ch. 124. (3) 31 Beav. 255.

tenant for life and of all persons who had become interested in his estate was essential.

In *Cooper* v. *Slight* (1) a testatrix directed her trustees to stand possessed of certain trust funds upon trust as to one moiety thereof, to pay the income to James Cooper during his life, and after his death, in trust for William James—empowering the trustees to raise any part not exceeding one-half of William James' share for his advancement, *subject* to the *consent in writing* of *James Cooper* during his life. The trustees were desirous of exercising the power; but James Cooper had become a bankrupt. It was held by Kay, J., that the power of consenting on the part of the tenant for life was not extinguished by his bankruptcy; yet, without the consent of the trustee in bankruptcy acting with the sanction of the Court of Bankruptcy, the trustees ought not to be allowed to exercise the power. This decision, I think, went very far, preventing the exercise of a power of advancement in favour of a minor who was in no way connected with the bankruptcy proceedings.

All these are cases, except one, where the donee of the power became a bankrupt, and the words of section 42 of the Bankruptcy Act of 1883 are very strong both in what they express and what they imply.

The exception, *Alexander* v. *Mills* (2), is a case of an out-and-out alienation of the whole property.

I am of opinion that they are all distinguishable from the question arising in this deed, in which the joint power is recited, in which the single power to arise in certain events is recited, in which the donee does not enter into any covenant to refrain from exercising the joint power, but merely covenants to exercise his single power on what remains after the execution of the joint power. The particular form of the deed has, in my opinion, the effect of reserving to the son the exercise, with his father, of the joint power unaffected by his covenant to create a charge on the death of his father.

There is one further argument put forward in support of the priority of the deed of 1868. It depends upon the expressions used in the deeds to which both the father and son were parties. It is contended that the language used in this deed, which was executed by the parties, having the power of joint appointment, was effectual to set up the deed of 1868 as a valid prior charge in the lands. I take the deed of the 20th December, 1872, because it affords the strongest ground for the argument.

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(1) 27 Ch. D. 565.

(2) L. R. 6 Ch. 124.

There is a recital that it was agreed by the parties "that these presents should be made subject to the following charges, so far as the same are now subsisting and capable of taking effect, and *so far only as they affect the several lands*, tenements, and hereditaments." It is true that among the charges afterwards enumerated appears the indenture of mortgage, dated the 4th July, 1868; but the charges are recognised as such in so far only as they affect the several lands. At that time there was, in my opinion, no charge created by the deed of 1868 that in any way affected the lands. Words of precaution used to protect a party from being held liable, in the event of certain other charges taking priority over the charge then being created, cannot and ought not to be distorted into a covenant to confer a priority that did not, in fact, exist. The same observation applies to similar words used in later deeds executed by both father and son.

I am, therefore, of opinion that the deed of 1868 must be removed from its place, No. 3 in the schedule, and put below what is now No. 9. For the same reasons, what is now No. 7, a deed executed by the son only, but at a later date, must be put below the deed of 1868.

Solicitor for the petitioners having carriage: *J. A. French.*
Solicitor for the creditors under the deed of 1868: *J. Rose Byrne.*
Solicitors for Miss M'Causland: *Reeves & Sons.*
Solicitors for other mortgagees: *Blake & Kenny.*
Solicitor for the owner, *Macnamara.*

W. C. S.

Ross, J.
1900.
July 16.

IN THE MATTER OF THE ESTATE OF GEORGE M. LANE, OWNER; SUSAN O'DONOVAN PERCY CREED, PETITIONER.

Renewable Leasehold Conversion Act—Fee-farm grant—Validity of separate grants made to owners of divided parts of estate of lessee—Grant at Common Law.

By a deed of 1698 A's predecessor in title demised certain lands to B for three lives, with a covenant for perpetual renewal. B's interest became vested in the predecessors in title of C, D, and E, and the lands were divided between them. In 1819 the lease was further renewed, and the day following this renewal the lands were partitioned between them by deed. In 1832 the lease was further renewed to C, D, and E, jointly. C purchased A's interest, and made separate fee-farm grants to D and E (without any reference in the *testatum* to the Renewable Leasehold Conversion Act), of the portion each had under the deed of partition. D's portion was for sale in the Land Judge's Court:—

Held, upon a query on the title of D, that, without deciding that the grants were valid under the statute, and subject to the argument of any objection by E, D was entitled to have his estate under his fee-farm grant offered for sale.

IN this case the Examiner had made a query as to the validity of a fee-farm grant under the following circumstances:—By an indenture, dated the 25th March, 1698, Edward Riggs demised to William Phipps half the plowland of Dunkerreen, in the county of Cork, for ninety-nine years, if the three lives therein named should last so long, and the lease contained a covenant for perpetual renewal. All the estate and reversion of Edward Riggs, the lessor expectant upon the determination thereof, became vested in Sir John Riggs Miller, Bart., and the interest of William Phipps, the lessee, became vested in Thomas Hornibrook, James Phipps, and John Phipps; and the lands were partitioned between them by separate metes and bounds, as same were held by them for several years before the deed of partition of the 22nd September, 1819; each of these three persons paid their own proportion of the rent and renewal fine and duties, payable from time to time, to the owner of the reversion. By an indenture of the 21st September, 1819, the lease was further renewed by Sir John Riggs Miller to Thomas Hornibrook, James Phipps, and John Phipps, for a like term. By a deed of partition, dated the 22nd September, 1819, and made between Thomas Hornibrook of the first part, James Phipps of the second part, and John Phipps of the third part, the said lands were partitioned between the three parties, and the lands have remained ever since as so partitioned. By a deed of the 21st May, 1832, made between Jane Elizabeth Wheatley, heiress-at-law and devisee of Sir John Riggs Miller, then deceased, of the one part, and Thomas Hornibrook, James Roche Deane, and John Phipps, of the other part, the lease was further renewed. The share of Thomas Hornibrook vested in George Mellifont Lane, the owner, and contained 148 acres. The share of James Roche Deane vested in James Henry Payne, and contained 125 acres. The share of John Phipps vested in Thomas Sherlock, and contained 176 acres. Subsequently James Henry Payne purchased the estate in fee-simple of the lands comprised in the lease of the 25th March, 1698, and became the owner under the Renewable Leasehold Conversion Act. George M. Lane and Thomas Sherlock having applied to James Henry Payne to execute to them separate grants of their respective holdings, by a deed of the 31st December, 1877, made between James Henry Payne, of the one part, and George M. Lane, of the other part, reciting the several matters above-mentioned, James Henry Payne granted (without, however, any reference to the Renewable Leasehold Conversion Act in the *testatum* of the deed) to George M. Lane the full divided third part of the half plowland of Dunkerreen, "which one divided third part had been held allotted and set apart in severalty by and between the parties named in the said recited deed of partition of the 22nd September, 1819, and therein described as that part of the said half plowland of Dunkerreen wherein the mansion house and demesne are situate," described in the map attached to this deed, and marked A thereon, to hold to George M. Lane, his heirs and assigns, for ever, subject to a fee-farm rent. The map in the deed also delineated the portion of the land belonging to Thomas Sherlock and James Henry

Payne. A similar fee-farm grant was made to Thomas Sherlock. George M. Lane's interest under the fee-farm grant was for sale in the Land Judge's Court, and the Examiner required the solicitors having carriage to show that the fee-farm grant was valid, having regard to the fact that it was a grant of only part of the lands comprised in the renewable lease.

Stubbs, for the solicitors having carriage :—

This is a good fee-farm grant under the statute. Smith, M.R., in *Palmer* v. *Slaney* (1), states :—" If such fee-farm grant was required, the head landlord might possibly (as has occasionally been done) make separate fee-farm grants to [certain persons] of the separate portions conveyed to them respectively by the Incumbered Estates Court Conveyance. If such separate grants were made there could be no future difficulty."

In *Abbott's Estate* (2), Ormsby J., held that a fee-farm grant could be validly executed to one of several owners of a lease in perpetuity with the assent of the other owners, in trust for himself and them. Here the assent is clear from the recitals in the deed. It was merely doing by one deed what could have been done by two; that is, a fee-farm grant to the three owners of the lease, followed by a partition between themselves. The Renewable Leasehold Conversion Act contemplates a fee-farm grant of portion of the lands. See sect. 6.

At any rate, if this is not a good fee-farm grant under the statute, it is a good grant at Common Law.

Ross, J. :—

I am inclined to think that this grant is not a good grant under the Renewable Leasehold Conversion Act. The grantee must, under section 35 of that Act, be " entitled at law or in equity to a lease or under-lease in perpetuity for the *whole* estate created or agreed to be created by such lease." The fee-farm grant in this case was not made to the person entitled to the whole estate in the lease of the 25th March, 1698. It may, however, be a good grant at Common Law; but, to show this, it must be proved that Mr. Payne had sufficient interest in him to make such a grant. Further, it has been the practice of this Court to set up doubtful grants if nobody can be injured. I intend to take that course in this case, after due inquiry. Mr. Sherlock, to whom a similar grant was made of another divided portion of the lands in the lease of the 25th March, 1698, must be served with notice, as he might possibly be injured by this grant, if now set up by me.

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(1) 14 Ir. Ch. R. 556.

(2) I. R. 11 Eq. 277.

Solicitors having carriage: *W. Guest Lane & Co.*

W. C. S.

Ross, J.
1900.
July 16.

IN THE MATTER OF THE ESTATE OF GEORGE BOND LOW, OWNER; BENJAMIN FRANKLIN, PETITIONER.

Renewable Leasehold Conversion Act—Validity of fee-farm grant—Purchase by lessee of part of lands in renewable lease—Fee-farm grant of the remaining part—Title.

By a lease of 1721 the lands of B. were demised to L.'s predecessor in title for lives, with a covenant for perpetual renewal, subject to a rent of £3 (Irish). The lessor's interest became vested in three persons, viz. A., W., and H. By a deed of 1766 the share of A. (viz. one-half) and W. (viz. one-eighth) of "the lands and rent of £3" were conveyed to the lessee, his heirs and assigns. A fee-farm grant of the remaining three-eighths of the lands was afterwards made to the successor in title of the lessee. It was objected that this grant was invalid as not being one of the whole of the lands in the lease:—

Held, that, without deciding whether the grant was good or not, the petitioner was entitled to have the lands offered for sale.

OBJECTION ON TITLE.

On the 3rd March, 1721, a lease was made of the lands of Brittas, situate in the county Cork, for three lives, with a covenant for perpetual renewal at a rent of £3 Irish, late currency. The lessor's interest afterwards became vested as follows:—As to half thereof in M. H. Adderly; as to one-eighth thereof in E. Wight; and as to the remaining three-eighths thereof in Joseph Harrison. In 1860 a Chancery petition was presented to the Court of Chancery by G. B. Low (the owner), and Pierce Purcell (a receiver), setting out these facts and praying that a fee-farm grant might be made to them, and by an order dated the 4th July, 1860, made on the petition they were given liberty to apply for and obtain a fee-farm grant, and it was referred to the Master to approve of the draft. By indenture of fee-farm grant dated the 19th May, 1862, reciting the lease of 3rd March, 1721, and a renewal thereof, and a conveyance dated 6th September, 1766, to the lessee by M. H. Adderly of one-half, and by E. Wight of one-eighth of the lands and rent of £3, and that M. H. Adderly was at that time entitled to 30*s.*, and E. Wight to 7*s.* 6*d.* of the said rent; and that John Graham was then entitled to the benefit of the covenant for renewal, and had acquired five-eighths of the reversion, and of the rent, namely, 37*s.* 6*d.*, which became merged or extinguished; and that the lessor's interest in the remaining three-eighths had become vested in Joseph Harrison, and that John Graham's estate had become vested in George B. Low the owner; and the appointment of Pierce Purcell as receiver; and further reciting the said petition and order of 4th July, 1860, and payment of £48 2*s.* 8*d.*, being three-eighths of renewal fines, and the demand for a fee-farm grant, and that the three-eighths renewal fine had been estimated at 7*d.* annually, making with the £1 2*s* 6*d.* Irish (equivalent to £1 0*s.* 9*d.*) a fee-farm rent of 21*s.* 4*d.*; it was witnessed that Joseph Harrison granted three-eighths of the lands of Brittas to George B. Low and P. Purcell, their heirs and assigns, subject to a perpetual rent of £1 1*s.* 4*d.* The Examiner objected to the title on the ground that the fee-farm grant was invalid having regard to the fact that it was of part only of the lands comprised in the renewable lease.

Colthurst, for the petitioners having carriage:—

The grant is good as being one of the entire of the lands comprised in the lease which remained after the conveyance of the five-eighths. The effect of the conveyance was to vest five-eighths of the reversion in the lessee, and to merge and extinguish five-eighths of the rent.

Ross, J.:—

Without deciding whether the fee-farm grant is valid or not under the Renewable Leasehold Conversion Act, I think this is a case where no one could possibly be injured by its being set up and considered valid. I therefore overrule the objection to the owner's title.

Solicitors having carriage: *Corker & Levis.*

W. C. S.

M. R.
1900.
Jan. 12, 13, 27.

Appeal.
March 14, 15.
May 9.

IN THE MATTER OF THE GWELO (MATABELELAND) EXPLORATION AND DEVELOPMENT CO., LIMITED.

(WILLIAMSON'S CLAIM.)

Company—Mortgage of uncalled capital—Winding-up order—Sub-mortgage of mortgage fraudulent against contributories—Notice of winding-up, but no notice of fraud—Assignee of chose in action taking subject to equities.

A mortgage of the uncalled capital of a company was given by the directors to the promoter's wife (whose name was used in the deed, at his request and for his convenience), to secure £3400, alleged to have been advanced for the company. The circumstances under which this mortgage was executed were such that the Court decided that it was as to £1350 (portion of the principal thereby secured) fraudulent as against the shareholders. The promoter's wife obtained an advance of £2750 by executing a sub-mortgage to W., who had no notice of the fraud affecting the transaction, though he was aware that the company had been ordered to be wound up in hostile proceedings:—

Held (reversing the decision of the Master of the Rolls), that once the winding-up order was made all the then uncalled capital, so far as not validly otherwise appropriated, became devoted to the payment of the general creditors, and that W., claiming under the sub-mortgage with notice of the statutory appropriation of all the uncalled capital, could not get against the company a title higher than that of the mortgagee under whom he derived.

ADJOURNED SUMMONS.

This was an application on behalf of the liquidator of the company to rescind the ruling of the chief clerk, allowing the claim of Arthur Williamson, on foot of a sub-mortgage of the 26th April, 1898, from Mrs. J. F. Lupton to the claimant for £2750. By this deed Mrs. Lupton sub-mortgaged to the claimant a mortgage from the company to her, of the 9th October, 1895, for £3400. The company went into liquidation in December, 1897, and Williamson's claim was challenged by the liquidator to the extent of £1350, on the ground that part of the consideration for the mortgage was for money paid by the promoters of the company before its formation, for which the company was not responsible, and that to that extent the mortgage was *ultra vires* of the company, and that the liquidator was not estopped by the acknowledgment in the mortgage that the £3400 was due to Mrs. Lupton, from disputing the validity of the mortgage to the extent of £1350, and that the sub-mortgagee had notice of the circumstances in which the mortgage was made.

The summons was adjourned into Court, and witnesses were examined on behalf of the liquidator and on behalf of the claimant. The facts of the case and the arguments of counsel sufficiently appear from the judgment.

Jefferson, for the liquidator.

O'Connor, Q.C., and *H. M. Byrne*, for Williamson.

[The following authorities were cited during the argument:—*Athenæum Life Assurance Society* v. *Pooley* (1); *In re Natal Investment Company* (2); *In re General Estates Co.; Ex parte City Bank* (3); *Bickerton* v. *Walker* (4); *Mahony* v. *East Holyford Mining Co.* (5); *In re Romford Canal Co.* (6); *Webb* v. *Herne Bay Commissioners* (7); *Christie* v. *Taunton* (8).]

Jan. 27.

The Master of the Rolls:—

The claim before me is on foot of a sub-mortgage of a mortgage, under the seal of the company, to Mrs. Josephine Florence Lupton, to secure £3400, and bearing date the 9th October, 1895. The claimant, Williamson, in 1898, advanced to Mrs. Lupton £2750, obtaining from her a sub-mortgage, dated the 26th April, 1898, to secure that sum and interest; and he subsequently lent £100 more as an additional charge on the same fund. The first and principal question in the case is as to the validity and extent of the charge acquired by Mrs. Lupton under her mortgage. To ascertain this it is necessary to consider some of the circumstances of the company and of the mortgages.

The Gwelo (Matabeleland) Exploration and Development Company, Limited, was incorporated on the 7th February, 1895, and was wound up by order of the 14th December, 1897, under circumstances of a remarkable character, which I reviewed at the time in a considered judgment. The company was promoted by Mr. L. S. Lupton, since deceased, the husband of Mrs. Lupton, the nominal mortgagee. He was then and remained an uncertificated bankrupt; but, notwithstanding, he had some command of money as will appear. The directors were qualified by him and were his nominees. He entirely controlled the company. The property of the company consisted mainly of mines or mineral properties in South Africa, some at least of which have never been found, or identified; and one of its objects was also exploration. Before the incorporation of the company, Lupton became acquainted with one Charles J. Fauvel, a mining engineer, who had had experience in South Africa, and conceived the idea of sending him out to inspect and report, not alone upon properties afterwards transferred, or pretended to be transferred, to the company, but upon others also in which he Lupton had an interest. To carry this out, he paid Fauvel a "retaining fee" of £400, as mining engineer, and subsequently sums amounting to £950 to equip an exploring expedition. When the £400 was paid, the company was not in existence. It was purely a personal matter between Lupton and Fauvel. From it the company never derived any benefit whatever. Fauvel did not go to Africa. The expedition did go; and was, after the formation of the company, treated as being under the control and in the pay of the company. The contract was not originally between the company and Fauvel; but it was afterwards adopted by the company, and any benefit which might have resulted from it (and, no doubt, benefit was expected or hoped for) would have belonged to the company. I do not think it can be held that the adoption of this part of the business was a fraud upon the shareholders. The share capital of the company consisted of £250,000, divided into 500,000 shares of 10*s.* each. These were all issued to Lupton in the names of his nominees (persons named Humby and Ridehalgh), some as fully paid up, and the rest credited with 7*s.* 6*d.* per share, as if that had been paid up. This was to pay him for his interest in the South African properties. Thus all that remained for working capital was the right to call up the balance of 2*s.* 6*d.* per share. As Humby & Co. were men of straw, of course nothing could be raised from this source till Humby & Co. succeeded in selling and transferring Lupton's shares to the public. After that, whatever the shares sold for, a call could be made on the holders; but Lupton through his *umbra* got what he could in the first instance. These arrangements were afterwards modified; but it is not now material to follow them further. Lupton had the strongest personal interest in keeping the concern going; and as it could not go on without some cash for expenses, he undoubtedly did advance in cash £2050 for that purpose. There was no prospectus issued by the company. All its share capital was placed at once. But there were expenses, including the publication of an address or circular letter by the directors to the shareholders (designed to serve as a prospectus without being under the special regulations attaching to a prospectus) which had to be met. Of course Lupton was entitled to require security; and he did so. This quasi-prospectus formed one of the chief grounds upon which I ordered the winding up of the company, but nothing turns upon it now. Meanwhile, Fauvel had been appointed by Lupton to be chairman of the company, his qualification being of course provided by Lupton; and he ceased to be Lupton's mining engineer. The retaining fee paid by Lupton was a matter for arrangement between themselves, at least it was no concern of the company in any way. Fauvel never was mining engineer to the company, even in name; and the money was paid to, and may have been spent, by him, before the company had any existence. Nevertheless, on the 27th May, 1895, Mr Watts, solicitor for the company, and a confederate of Lupton's, presented to the directors a mortgage deed, ready prepared, for £3400 in the name of Mrs. Josephine Florence Lupton. Her name was used, because her husband was a bankrupt, and had not obtained his certificate. Of this there can be no question. I afforded every opportunity of producing her for examination. The recent death of her husband, and her own state of health, afforded a reasonable ground for her non-attendance; but she might have made an affidavit, or have been examined on commission. Neither course was adopted. But whether the mortgage was drawn up in the name of Lupton himself, or of a trustee for him, is not material. The cheques for the £2050 cash were drawn by a company (Turner, Lupton & Co.,

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(1) 3 De G. & J. 294.
(2) L. R. 3 Ch. App. 355.
(3) *Ibid.* 758.
(4) 31 Ch. D. 151.
(5) L. R. 7 H. L. 869.
(6) 24 Ch. D. 85.
(7) L. R. 5 Q. B. 642.
(8) [1893] 2 Ch. 175.

Limited), which was under the control of Lupton; and the remainder of the £3400, viz. £1350, had been paid to Fauvel by Lupton himself. It consisted of the £400 retaining fee, and sums amounting to £950 spent upon or in reference to the expedition to South Africa. The directors were not in a position to act independently; yet they at first recoiled from this transaction. I had occasion in giving judgment on the winding up application to comment severely on the conduct of Mr. Fauvel in reference particularly to statements made by him to the shareholders. He is a very able man, and lent the weight of his ability and authority to transactions with which he ought to have had nothing to do. I am bound to say, however, that on the two occasions on which he has been examined here since the winding up I have found him straightforward and candid in giving his evidence. This is his account of what happened on May 27th, 1895:—" *Q.* Mr. Watts was the company's solicitor?—*A.* Yes. *Q.* Did you, prior to the 14th May, as chairman, or by resolution of the board, ever instruct Mr. Watts to prepare a mortgage?—*A.* I have no recollection. *Q.* If it took place it would appear on the minutes?—*A.* Yes. *Q.* There is nothing on the minutes about it?—*A.* On the 14th May there was a meeting of the directors. Here is the minute:—' The solicitor tabled a mortgage deed, securing to Mrs. Josephine Florence Lupton the payment of the sum of £3400, and the same was received by the secretary. It was pointed out that the sum mentioned at the board meeting, held on the 14th instant, was £950 and £2050, equal to £3000, the former sum being the amount paid by the promoter for the equipment and despatch of the engineer to Gwelo, and the latter the further sum agreed to be paid by him to the company. The solicitor explained that the promoters had also paid Mr. Fauvel a retaining fee of £400, as per statement made at the Board meeting on the 10th March last. Dr. Herron pointed out that the understanding was that the sum was to be paid by the promoter personally, the party who made the arrangement; the company had no knowledge of the arrangement at the time it was made, and had in nowise been consulted as to it. Mr. Sach also protested against the £400 being charged to the company, and the chairman being referred to said that he had certainly understood that the whole of the £1200 fee was to be paid by the promoter, who had made the arrangement, and paid him the £400 previously to his joining the board, the original intention having been to secure his services purely in his professional capacity as engineer. The solicitor stated that his firm had introduced Mr. Fauvel to the promoter, who had requested them to obtain a thoroughly practical engineer. He would suggest, nevertheless, that it might be expedient to place no obstacle in the way of getting the £2050, and that the question of the £400 might be arranged later on. After considerable discussion it was resolved to sign it as engrossed, which was accordingly done.'"

The mortgage was executed by the directors for £3400. It comprised the whole property of the company, that is to say its only tangible assets, all the uncalled money upon shares issued or to be issued to the public. So far as the £2050 is concerned, there is no doubt the mortgage was valid. I am satisfied that it was in fact paid and used. So far as the £950 is concerned I have already said that it was a payment which under the circumstances it would not be *ultra vires* for the directors to adopt; and I am unable to say that it was fraudulent to include it in the mortgage. But the £400 stands upon a wholly different footing. The inclusion of it in the mortgage was nothing more or less than a fraud upon the company, that is the shareholders, by making them liable to pay, out of calls to be made upon them, the private debt of Lupton. To that extent therefore the mortgage was fraudulent in the hands of Lupton and his trustee; for of course Lupton knew all about the matter. Watts I have called Lupton's confederate; the word is not too strong, as those who are conversant with the facts proved in the case, of which I have judicial knowledge, are aware. Both personally, and through his solicitor, Lupton had the fullest notice of all that I have stated. Thus Lupton (or Mrs. Lupton) could not have recovered this £400 under the mortgage if the truth was known.

Subsequently, the company obtained a loan of £13,000 from Brown, Jansen & Co., bankers, upon a mortgage of its property; that is, of course, the directors did. Brown, Jansen & Co., insisted upon having a first charge, and, accordingly, Mrs. Lupton's formal consent to postpone her charge, or rather to cancel her charge and accept a new one, was produced. The mortgage to Brown, Jansen & Co., was executed, and a new mortgage made to Mrs. Lupton, dated 9th October, 1895. The £400 which was to have been considered again was not considered, but was simply included in the new security for £3400. I had better read the evidence: "*Q.* I understand it became afterwards necessary for the company to borrow a sum of £15,000?—*A.* £13,000. *Q.* You were to borrow that from some banking company?—*A.* Yes. *Q.* What was the name of that bank?—*A.* Messrs. Brown, Jansen, & Co. *Q.* I think you required that £13,000 for some special purpose?—*A.* Yes. *Q.* I think to acquire some further properties?—*A.* Yes. *Q.* Am I right in saying that the bankers before lending you that money required that the mortgage to Mr. Lupton should be postponed?—*A.* Made a second mortgage. *Q.* Made puisne to that of the bankers.—*A.* Yes. *Q.* And, then, when you got the money from Messrs. Brown, Jansen & Co., to give her a new mortgage?—*A.* Yes. *Q.* Then you gave a mortgage to Messrs. Brown, Jansen & Co.—*A.* Yes, the first mortgage. *Q.* Can you tell me the date of that?—*A.* It was in the autumn. Mr. Jefferson: 8th October, 1895. By Mr. O'Connor, Q. C.—'The chairman reported his interview with Messrs. Brown, Jansen & Co., respecting the loan of £13,000 and the draft agreement between this firm and the company securing the repayment of the £13,000 was read and discussed; but the execution of the agreement and the signing of the promissory note thereto was delayed owing to the absence of Mr. Sach.' Next day—'The engrossment of the new (second) mortgage given to Mrs. Lupton was tabled and read. Resolved that the first mortgage in favour of Mrs. Josephine Florence Lupton be cancelled with her consent; and a second mortgage given, subject to a first mortgage to be given to Messrs. Brown, Jansen & Co. A letter received from Mrs. Lupton in which she agreed to accept a second mortgage, having been read, it was resolved that a second mortgage deed in Mrs. Lupton's favour dated the 9th October, 1895, be sealed with the company's seal, signed by the directors, and countersigned by the Secretary. Resolved that a cheque for interest due on the original mortgage given to Mrs. Lupton be drawn and signed. A cheque for £62 8*s.* 3*d.* was to be handed to Mr. Lupton on the completion of the Limpopo Concession Loan. Resolved that a first charge upon the uncalled capital of the company be given to Messrs. Brown, Jansen & Co., to secure a loan of £13,000 to be advanced by them, together with other security. Resolved that a promissory note be given to the bankers for the sum of £13,000. Resolved that the company draw a bill on Messrs. J. W. Turner, Lupton & Co., Limited, to be handed over to the trustees to further secure the advance of £13,000.' "

" *Q.* (To the witness) I notice in this minute of the 8th October, 1895, that a cheque for £68 8*s.* 3*d.* was to be handed to Mrs. Lupton; what was that for?—*A.* Interest on the mortgage. *Q.* To Mrs. Lupton?—*A.* To Mrs. Lupton. *Q.* Was that calculated on the £3000 or £3400?—*A.* It was calculated on the £3400. *Q.* Was it since the execution of the mortgage of February, 1895, that interest was paid on £3400?—*A.* Yes. *Q.* And the substituted mortgage was also for £3400?—*A.* Yes. *Q.* You will see in the minute of the 14th May, 'It might be expedient to place no obstacle in the way of getting the £2050, and the question of the £400 might be arranged later on.' Was there any arrangement as to the £400 between May and November—*A.* Mr. Lupton was approached by me personally, and he promised to take it off, but he did not appear at the meetings. *Q.* Again, after a little discussion, and with the matter clearly before your eyes, you executed the second mortgage for £3400? The Master of the Rolls:—What is the date of it? Mr. O'Connor, Q.C., the 9th October, 1895. *Q.* Am I right in saying that you signed this second mortgage, too, as chairman.—*A.* Yes. *Q.* It is also signed by Dr. Herron and Mr. Sach as directors?—*A.* Yes. *Q.* Sealed by the seal of the company?—*A.* Yes."

The mortgage of 9th October, 1895, save so far as priority is concerned, cannot be in any better position than that of May. It was nothing but a continuation of the previous fraud, if fraud there was; and the one security was neither better nor worse than the other. So matters stood when the order for winding up was pronounced in December, 1897.

In April, 1898, Mr. Williamson, who is a banker, took from Mrs. Lupton a sub-mortgage of her rights under the deed of October, 1895. The account he gives of the transaction is that a

Mr. Benjamin, a solicitor, came to him, and asked him if he would entertain a loan of £3000 or so on first class security, and he placed the matter in the hands of his solicitor, Mr. Digby. He knew that the first class security was a mortgage of uncalled capital in a company in liquidation in Ireland. He was told there was money in the hands of the liquidator, but did not know how much nor did he inquire. He never saw Mrs. Lupton, and of her husband he only knew that he was not exactly the sort of man he would like to see in his house, though he had seen him in the city. Mr. Digby knew that it was a second charge, though the loan from Brown, Jansen & Co. had been reduced to £1500. He had never heard the name of the company, and knew "absolutely nothing about it." He had a statutory declaration by Mrs. Lupton that the money was due. He did not apply to the liquidator till the transaction was completed. The mortgage to Mrs. Lupton had not been stamped, though it was nearly two and a half years old. The penalty, however, was paid. He required a copy of the resolution sanctioning the mortgage, but was put off, and dropped it there. So far as I can see neither Mr. Digby nor Mr. Williamson was aware of or inquired what the security was which they were obtaining. All they knew was that it was a mortgage of unpaid capital of unascertained amount in a company in compulsory liquidation, and that Brown, Jansen & Co., had lent £13,000 on a prior charge, of which £11,500 or so had been paid off. This latter circumstance would not greatly affect the security; for the more that was paid off on foot of prior charges, the less there remained to meet subsequent ones. It is strange that such a transaction should have been so conducted in the city of London.

Still the fact remains that Williamson paid his money on this security; and there is no doubt that he is entitled to the benefit of it to the extent to which it was valid in the hands of Mrs. Lupton. He claims more, however; and contends that, as a *bona fide* purchaser for value without notice, he is in a better position than his mortgagor, and can claim not £3000 but £3400. I understand that the interest due on the £2850 principal renders this question material.

Mr. O'Connor argued that though assignee of a *chose in action*, as Williamson is, he stands in a better position than his assignor, having as against the company a superior equity. What he relied on as constituting a superior equity was the acknowledgment in the mortgage of 9th October, 1895, that £3400 was due to Mrs. Lupton. This armed her with the means of committing a fraud; and by it she did mislead Mr. Williamson. Whether this statement of the consideration money, which occurs in every mortgage, was relied on as an equity or as an estoppel against the company, the effect must be the same. The question is whether as against the company Mr. Williamson can insist that the statement must be made good. That he took his sub-mortgage without any precaution whatever would not seem greatly to affect this question. That he need not have had anything to do with the transaction, which was an irregular one, seems equally unimportant. The money due to Lupton, whatever it was in October, 1895, remained due in 1898. The point is, does the recital in the mortgage of 1895 conclude the company from saying that it was £3000 only, and not £3400?

Of course the ordinary rule is that the assignee of a *chose in action* takes subject to the equities. But it is said here the act of the directors as regards third persons is the act of the company, and no doubt that is usually so when they act within the scope of their authority. When, however, directors, though acting within the scope of their authority, really concoct or join in a fraud upon the company, no one with notice of the fraud, and above all no party to it, can take advantage of it. Can his assignee be in a better position, when as here the thing assigned is a *chose in action?*

Formerly the assignee of a *chose in action* had to use the name of his assignor in proceedings to assert his rights. Thus, any defence available against the latter was an answer to the former, which is the origin of the doctrine. Since the Judicature Act the assignee can sue in his own name; but that enactment was never meant, and does not purport, to alter the whole equitable doctrine as to *choses in action*, as Mr. O'Connor contended it did. In the case of the *Romford Canal Company* (1) the law is discussed by

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(1) 24 Ch. D. 85.

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Kay, J., in reference to irregularly issued debentures, at p. 92:—"I understand the law as at present settled, or perhaps I should rather say developed, thus: Where a Company has power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*: *Fountaine* v. *The Carmarthen Railway Company* (1). If such security be legally transferable, such an irregularity, and, *a fortiori*, any equity against the original holder, cannot be asserted by the company against a *bona fide* transferee for value without notice: *Webb* v. *Commissioners of Herne Bay* (2). Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity: *In re Agra and Masterman's Bank* (3); *In re Blakeley Ordnance Company* (4); *Dickson* v. *Swansea Vale and Neath and Brecon Junction Railway Company* (5)."

The case of the *Natal Investment Company* (6) was not a decision of the House of Lords, as Mr. Jefferson supposed when quoting it, but of the Court of Appeal. It is, however, a decision of Lord Cairns, and of course entitled to the greatest weight. At first I thought that it ruled this case. In that case a number of debentures had been issued by the company in this form:—"Whereas the Natal Investment Company, Limited, hereafter designated the company, is indebted to A. Coqui in the sum of £500, now these presents witness that in consideration of the premises the company hereby declares that the funds, assets, and property of the company shall be subject and liable to the same, and the company hereby undertakes to pay unto the said A. Coqui, or to his executors, administrators, or transferees, or to the holder for the time being of this debenture bond, the sum of £500 on the 30th June, 1867, and to pay interest thereon at the rate of 6 per cent. per annum from the 30th June, 1865, until payment of the said principal sum, such interest to be paid half-

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(1) L. R. 5 Eq. 316.
(2) L. R. 5 Q. B. 642.
(3) L. R. 2 Ch. App. 391.
(4) L. R. 3 Ch. App. 154.
(5) L. R. 4 Q. B. 44.
(6) L. R. 3 Ch. App. 355.

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yearly at the principal office of the company for the time being in London. Provided also that the payment of the said sum of £500, or other amount due upon this debenture bond, to the person presenting the same, shall be a good and sufficient discharge to the company from any claim or demand in respect thereof." Coqui had agreed with the company to sell to them land in Natal. Part of the price was to be paid on the signing of the agreement, and the rest on completion, partly in bills and partly by the delivery to the vendor or his nominees of debentures of the company, carrying interest at 6 per cent. per annum, and bearing even date with the transfer of the estates, one-half of the debentures to be payable at the expiration of two years, and the other half at the expiration of three years from the date thereof. Coqui asked the company to issue him some of the debentures at once, and stating that he was in a position to transfer the land at any moment, and the company accordingly issued the debentures to him. Coqui, who was somewhat in the position of Lupton, deposited three of these bonds with the Financial Corporation as security for money due. He wholly failed to carry out his contract with the Natal Company, having no title to the land he professed to sell. It did not appear that the Financial Corporation had any notice of this. The company was wound up, and the Corporation claimed the amount of the debentures. That case is remarkably like this case, but stronger. Here the claim is for a fixed sum due under a mortgage; there the claim was on foot of debentures, which are generally treated as the subject of sale in the market for what they will fetch, which may be more or less than the nominal value. The intention of a company issuing such debentures under such circumstances is to finance the person to whom they are given. Lord Cairns, in giving judgment says:—"In the present case there is no contract for debentures in any particular form." He then states the terms of the contract, which I have already mentioned, and continues:—"The contract, therefore, is simply this, that part of the purchase-money was to be paid by instruments formerly called bonds, but now called debentures, of the company, payable at a certain date, and to be given to Coqui, the vendor. Taking, therefore, the construction of the debenture as that which must be determined

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upon the face of it, and without any antecedent contract leading up to a debenture in any particular form, we find that the debenture is constructed in this way. It proceeds upon a recital of a debt due from the company to Coqui. The object of the debenture, on the face of it, is to secure Coqui this debt. The covenant is made with him. The payment is to be to him, or his executors, administrators, or transferees. Stopping at this point, the word 'transferees' would obviously be simply equivalent to 'assigns,' and 'assigns' would mean, according to the ordinary construction of such an instrument, an assign by deed—an assign in a way in which an assignee of a bond, or other *chose in action* of the same kind, is created. The executors and administrators would be subject, if the claim for payment were made by them, to any equities which might exist against Coqui himself. So also assignees or assigns by deed would be subject to the same equities." He then says that there is nothing in any engagement antecedent to the debenture, nothing in the surrounding circumstances of the case, and nothing in the construction of the debenture itself to show that the Natal Company intended to forego or to renounce the ordinary rule, that the assignee of a *chose in action* must take subject to the equities between the original parties, and concludes as follows:—"In my opinion, therefore, although the Financial Corporation must be admitted to prove upon these debentures, they can only prove as persons who are depositees and holders of them under Mr. Coqui, and subject to all equities which exist between him and the company. The order of the Master of the Rolls must be varied accordingly."

I have found it difficult to distinguish that case in principle from the present. It is "explained" in another case in the same volume, *In re General Estates Company* (1). Page Wood, L.J., says:—"As regards the *Natal Company's Case* (2), I do not think that the Lord Chancellor there over-ruled the other cases. In that case there was an agreement to pay to a certain individual, his executors, administrators, or transferees, which his Lordship held equivalent to his executors, administrators, or assigns. Thus far, therefore, the instrument was in the form of an ordinary money bond, but there were the added words: 'or to the holder for the time being of this debenture bond,' and the Lord Chancellor said those words were not intended to control the general character of the instrument, but were only intended to dispense with the necessity of executing a formal assignment by deed. There the instrument was in other respects in the ordinary form of a covenant to pay, while here it is in the form of a promissory note payable to order." Selwyn, L.J., says:—"The present case is broadly distinguishable from that of the Natal Company, on the grounds mentioned by the Lord Justice." This is really no explanation at all. It is true there was in the *Natal Company Case* (1) no separate receipt for the money; nor is there here. But in each there is a recital, which if true would support the claim for the full amount. Each was the case of a company giving securities through its directors. But the *Natal Case* (1) is, as I have shown, explained, or explained away, in the *General Estates Company's Case* (2), and the explanation is adopted and approved by Kay, J., in the case I have referred to. He says (24 Ch. D. 91):—"The decision of Lord Cairns, L.C., in *In re Natal Investment Company* (1), which some lawyers appear to have been puzzled to reconcile with other cases, is explained in *Ex parte City Bank* (3) in a way which to my mind is very satisfactory. The instrument there in question was a money bond, and the words used in it were only equivalent to the word 'assigns,' which occurs in every money bond, and is never understood to represent that it is assignable at law but only in equity, and therefore only transferable subject to equities, but Lord Cairns did not decide that if an instrument is issued purporting to be legally assignable, and which the public have a right to believe to be so, the company can maintain an equitable defence which they might have against the original owner, so as to defeat the claim of an equitable transferee for value. Thus understood the case is identical with *The Athenæum Life Assurance Society* v. *Pooley* (4). In neither case was there any intimation by the company that the instrument was transferable at law."

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(1) L. R. 3 Ch. 355.

(2) L. R. 3 Ch. 763.

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(1) L. R. 3 Ch. 355.
(2) L. R. 3 Ch. 763.
(3) L. R. 3 Ch. 758.
(4) 3 De G. & J. 294.

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The case, however, which seems nearest to the present in principle is *Bickerton* v. *Walker* (1). It is a decision of the Court of Appeal consisting of Sir James Hannen, Bowen, and Fry, L.JJ. The facts are stated in the judgment of the Court delivered by Fry, L.J. :—" In the year 1879 a sum of £575 New 3 per Cent. Annuities was standing in the name of a trustee under the will of Mrs. Goulston, upon trust for the plaintiff, Mrs. Bickerton, for life, with remainder in equal shares to her children living at her death, and the issue of children then deceased. She had three children, of whom the plaintiff, Miss Bickerton, is one. By an indenture bearing date the 10th February, 1879, the plaintiffs assigned to the defendant Bates their interests in these annuities to secure a sum of £250 and interest at 7 per cent. payable on the 10th August, 1879. On this mortgage there was indorsed the usual receipt for £250, which was signed by both plaintiffs. The plaintiffs allege that sums amounting to £91 17*s.* 6*d.*, and no more, were paid to them in respect of the £250, and though the evidence adduced by the plaintiffs is far from satisfactory, we are of opinion that as against the defendant Bates the plaintiffs have established by evidence a case for reducing the mortgage, or, in other words, that as against Bates the plaintiffs would be entitled to a declaration of their right to redeem on payment of what should be found to have been actually advanced on the mortgage with interest. On the 11th March, 1879, the defendant Bates assigned this mortgage security to the defendant Hunter, and it is not disputed by the plaintiffs, but that this defendant has shown that he paid the full consideration of £250 for the assignment, and that he took the assignment without actual notice of any equity subsisting between the plaintiffs and Bates except the equity of redemption according to the form of the mortgage deed. The plaintiffs, however, contend that inasmuch as the assignment of their interests in the legacy was the assignment of a *chose in action*, the defendant Hunter is now liable to all the equities which the plaintiffs had at the date of the assignment against his assignor Bates. This the defendant Hunter denies. As the legal interest in the legacy was and is vested in the trustee of Mrs. Goulston's will, it is evident that the interests both of the plaintiffs and of Hunter are equitable interests only, and the real question for our decision is, what are the relative merits of these persons having adverse equitable interests? If the merits of the one are greater than those of the other, the Court will give the priority to the greater merits; and if, and only if the merits are equal, it will give the priority of right to the one who is prior in point of time. The plaintiffs executed a deed which recited that they had received the whole sum of £250, and which stipulated that their right of redemption should be on payment of the sum of £250 and interest, they signed a receipt on the back of the deed that they had in fact received this sum of £250, and they permitted Bates, or Astley who was acting with or for him, to have possession of the deed containing these false statements. That the plaintiffs were in a moral point of view excusable for these acts is beyond doubt, and that they were deceived by those whom they trusted, and as such are objects of sympathy, is legally clear. But they were inexact and careless, and placed in the hands of Bates and Astley the means of deceiving other persons, and these are in the view of a Court of Equity demerits. Was Hunter guilty of negligence or want of care in his part of the transaction? He must on the evidence before me be taken to have advanced his money on the faith of the production of the mortgage deed and receipt signed by the plaintiffs; and if the assignment by the plaintiffs had been, not a mortgage, but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter in not inquiring of the plaintiffs as to their rights or claims." He then comes to the conclusion that Hunter was not guilty of negligence nor want of care. "We are of opinion (he adds) that if an assign is willing to take the risk of any payment having been made after the date of the mortgage he is not guilty of carelessness or negligence, if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor." Then comes this important passage:—

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(1) 31 Ch. D. 151.

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"The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand. Our decision" (he concludes) "follows, as will be obvious to those who are familiar with this branch of the law, the general lines laid down by Kindersley, V.-C., in *Rice* v. *Rice* (1)."

One distinction which strikes me is that to which I have already referred, namely, that in the present mortgage there is no separate indorsed receipt for the consideration, and that point is referred to in the judgment of Fry, L. J., at p. 159, as "highly important," but its importance must be relative. It is important (say) as showing that the deed is not an escrow gone astray, but a completed transaction. When, as here, the document comes out of the proper custody, and is sealed with the company's common seal, attested by the signature of chairman, two directors, and the secretary, a separate receipt would hardly have seemed more binding or certain. Especially in the case of so short a deed, one which "he who runs may read."

I cannot reconcile the principle of *Bickerton* v. *Walker* (2) with the *Natal Company's Case* (3), nor with the *Athenæum Society* v. *Pooley* (4); but it is the more recent decision, and I think binds me. It is the case of a simple mortgage, not of debenture bonds issued with the intention that they should be taken into the market, or negotiated as if they were negotiable instruments. Of course a mortgagee may be partly paid off after the loan; and of this a purchaser from him takes his chance. But no question of that sort arises here where nothing has been done by payment, set-off, or otherwise, to reduce whatever amount was due for principal in October, 1895. *Bickerton* v. *Walker* (1) seems to me to decide that in the case of an ordinary mortgage a receipt for the money in the deed estops the mortgagor from denying as against the assignee of the mortgage that the specified sum is then due; even though as against the mortgagee himself such a defence was open to him; and section 54 of the Conveyancing Act, 1881, seems to fortify the observations I have already made in reference to the absence of a special indorsed receipt.

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(1) 2 Drew. 73.

(2) 31 Ch. D. 151.

(3) L. R. 3 Ch. 355.

(4) 3 De G. & J. 294.

Then, has the sub-mortgagee lost his right to rely on this equity by reason of his negligence? I cannot say that he has. He has been wonderfully negligent in quite a number of particulars, as I have shown. But it is not proved to my satisfaction that his negligence in any particular has been the cause of his not knowing the facts about this £400. He is entitled to assume that the directors represented the company—as they in law did. If they did, all the rest followed, to bring the case within *Bickerton* v. *Walker* (1), and, though I frankly admit I do not entirely see my way to express any independent opinion as to the decision in that case, it is, as I have said, binding on me.

W. L.

Appeal.
1900.
March 14, 1
May 9.

The liquidator appealed to the Court of Appeal (Walker and Holmes, L.JJ.).

Matheson, Q.C., and *Jefferson*, for the appellant.

O'Connor, Q.C., and *H. Morgan Byrne*, for Williamson.

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(1) 31 Ch. D. 151.

Appeal.
1900.

In re GWELO, &c., CO. WILLIAMSON'S CLAIM.

May 9.

WALKER, L.J. :—

I have had the advantage of reading a judgment prepared by Lord Justice Holmes, who has gone elaborately into the facts, and I shall only state them sufficiently to make my view intelligible. I am of opinion, in the first place, that the claim under the mortgage of the 27th May, 1895, or of the 9th October, 1895, could not, as regards the two sums of £400 and £950, be enforced at the suit of Mrs. Lupton against the Company, or now against the liquidator representing it.

This Company was promoted by Lupton, who, in the name of his wife, was the real mortgagee.

Fauvel was a mining engineer, and Lupton desired to make explorations in South Africa, with a view of forming a Company to work certain alleged properties there. Part of these properties consisted, as alleged, of Gwelo in Matabeleland, and this promoter, for his own purposes, arranged with one Fauvel to send him out to South Africa to explore and report. These were preliminary expenses, and were to be paid by Lupton. He paid Fauvel in February, 1895, £400 as a retaining fee, and arranged that he should go out at Lupton's expense. The Company was formed on the 7th February, 1895, and registered in Ireland.

On the 11th March, Lupton considered that it would be more for his interest to have Fauvel chairman of the Company in London, and he arranged that he should remain there, and he furnished Fauvel with the share qualification. This rendered necessary an alteration in the *personnel* of the exploring expedition, and Fauvel was employed to provide the men. Lupton paid £400 or £450 to fit them out and pay their passages. He also gave a further sum when they were leaving, and provided another sum to meet them on arrival in South Africa—in all, besides the £400, £950 ; receipts were given to Lupton personally. This expedition was fitted out in reference to other supposed properties, as well as Gwelo. The £950 was paid, part in March, part in April, and part in the beginning of May ; but the whole £1350 was paid under a liability which Lupton undertook, and I infer, though the evidence is not very clear on the point, that the original £400 was paid before the Company was even formed. Lupton had control over all the share capital, and in May, inasmuch as some cash was required to open a bank account, and begin business (I mean by that the business of working off the shares not fully paid up), he agreed to lend the Company £2050, which he undoubtedly did, and the charge has not been disputed to the extent of that sum.

The Company had power, under their constitution, to mortgage uncalled capital. Watts, who was solicitor for Lupton, was also solicitor for the Company, and he prepared, and on 14th May submitted to the Company, represented by Fauvel as chairman and two other directors, a mortgage of uncalled capital, which not only secured the £2050, but also brought in the £1350, under a recital:—"And whereas the Company is indebted to the mortgagee in the sum of £3400, as the Company do hereby admit and acknowledge." By the deed the payment and receipt of that sum are also acknowledged, and the Company covenanted to pay the entire £3400, and charged all the uncalled capital for the time being with its payment. Exception was taken even by the then directorate to the inclusion of the £400; but it was agreed that the mortgage should be executed, leaving the question open as regards the £400. Fauvel of course knew that the liability for the £1350 was originally at all events a liability of Lupton, and the transaction was in effect the imposition on the Company of a liability which Lupton had undertaken to provide. In my opinion, as between Lupton and the Company, the insertion of £1350 in the mortgage was unauthorized in point of law and fraudulent.

The Company afterwards required a further loan, and Mrs. Lupton took a substituted mortgage of the 9th October, 1895, on the same terms, letting in the new creditor in priority. I agree with the Master of the Rolls that she is in no better position under the substituted security. The Company, as might be expected, proved an utter failure, save to the extent of working off a considerable amount of its shares amongst the public, and it was finally ordered by the Master of the Rolls to be wound up. The order bears date the 14th December, 1897, and the basis of it appears to be that the Company was conceived and conducted in fraud throughout.

The present claimant acquired his security on the 26th of April, 1898. He states he is a banker in London, and that he was waited on by a Mr. Benjamin, a London solicitor, who asked him whether he would lend money on a security which he stated to be a good one, and he put the matter in the hands of his own solicitor, Mr. Digby. Mr. Lupton was not communicated with, but he got a statutory declaration from Mrs. Lupton that the amount was due. He knew that the Company was in liquidation under a hostile Court order, and he had the address of the liquidator, but he made no inquiry from him. He agreed to advance £2750, at ten per cent. interest: he states he paid the said sum of £2750, and he obtained an assignment from Mrs. Lupton of her mortgage for £3400, and he states that he had no knowledge of any infirmity attaching to that security, and Mr. Digby, his solicitor, makes the same statement.

The main question in the case is whether Mr. Williamson, the assignee of a *chose in action*, is in a better position than Mrs. Lupton would have been. The Master of the Rolls has decided that he is, feeling himself coerced to that conclusion by the decision in *Bickerton* v. *Walker* (1).

The general rule is long established that an assignee of a *chose in action*, such as the mortgage in question is, takes it subject to all the equities subsisting against it in the hands of the assignor; but this is subject to an exception, which itself springs out of the foundation on which the rule rests, that the debtor may by his conduct, contemporaneous or subsequent to the assignment, or by the form of the instrument which creates the *chose in action*, preclude himself from taking advantage of the rule, and enable the assignee to rely as against him on the form of the instrument, as showing that it was intended that the assignee should take discharged of such equities; of this latter class there are numerous cases, of which *In re Agra and Masterman's Bank* (2) and *In re Blakely Ordnance Co.* (3) may be cited as examples when the obligation is to pay the holder or bearer for the time being, or is in some equivalent form. So when the Company issue certificates or register the holder as proprietor, they may by their conduct be estopped. Still the general rule remains, and was applied under strong circumstances in *The*

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(1) 31 Ch. D. 151. (2) L. R. 2 Ch. 391. (3) L. R. 3 Ch. 154.

Athenæum Life Assurance Co. v. *Pooley* (1), even though the transferee for value without notice had been registered as transferee and been paid interest.

The decision of Lord Cairns in *In re Natal Investment Company* (2) was to the same effect, though the Lord Chancellor, no doubt, took a strong course in holding that the words in the debenture, "or transferees or to the holder for the time being of this debenture bond," were only equivalent to the word "assigns." There, too, the bond recited the existence of a debt. It was held by Lord Cairns that the assignee took subject to the equities affecting the original holder.

Bickerton v. *Walker* (3) was the case pressed on the other side, and it materially influenced the Master of the Rolls. In that case the plaintiffs were equitable owners of interests in Government Stock, which they mortgaged to Bates, to secure a sum (nominally) of £250; but they proved that only £91 17*s.* 6*d.* was advanced. That deed contained an acknowledgment, and a receipt was endorsed for the money. Bates assigned to Hunter a purchaser for value, without notice, who paid him the £250, and it was contended that Hunter was bound (as it was assumed Bates would be) to give credit for the difference between £250 and £91 17*s.* 6*d.* Hunter made no inquiry from the plaintiffs as to their rights. The Court treated the case as turning upon a conflict between two equities. Fry, L.J., says:—"The real question for our decision is what are the relative merits of these persons, having adverse equitable interests? If the merits of the one are greater than those of the other the Court will give the priority to the greater merits. If, and only if, the merits are equal, it will give the priority of right to the one who is prior in point of time." It was held that Hunter was not guilty of negligence by reason of making no inquiry from the plaintiffs; but as the deed contained a receipt clause for the full £250, the mortgagors had placed in the hands of Bates the means of deceiving transferees, and that Hunter, who relied upon the production of the mortgage deed and receipt clause, had a better equity than plaintiffs. It will be observed that this case was not one of a debtor resisting the claim of the assignee of a secured creditor of

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(1) 3 De G. & J. 294. (2) L. R. 3 Ch. 355. (3) 31 Ch. D. 151.

Appeal.
1900.
In re
GWELO, &c., Co.
WILLIAMSON'S CLAIM.
Walker, L.J.

that debtor, on the ground that the assignee of a *chose in action* had no higher title than the assignor. It was treated as a conflict between two equitable titles under the same trust in which the scale was turned by the presence and possession of the receipt for the money in the deed.

I doubt very much that the principle there applied was intended to apply to the case of a mortgage or debenture given by a Company containing an acknowledgment of debt or receipts for the money. If it were the decision in *The Athenæum Life Assurance Co.* v. *Pooley* (1) and the case of *The Natal Investment Co.* (2) would be inconsistent with it, for I cannot distinguish between the recital in a deed of the admission of the debt and a receipt clause.

In this case, however, I think there was evidence that Williamson was guilty of great negligence. He knew the Company was under hostile liquidation, and he knew the address of the liquidator, and he yet abstained from making any inquiry, and he knew that the uncalled capital, the subject of the mortgage, was *prima facie* devoted to the payment of general creditors, but he rested satisfied with the deed he got over and a statutory declaration from Mrs. Lupton. If he had inquired from the liquidator he would have been told the whole truth as to the Company and the security.

But I rest my judgment mainly upon this, that an order to wind up the Company had been made on the 14th December, 1897, and Williamson had notice of this, and that it was made hostilely. From that date all the uncalled capital was, under the the 38th sect. of the Act of 1862, devoted to paying the claims of general creditors, save so far as it was validly diverted by a valid security. The winding up order fixed the rights of all parties; and as Williamson chose to take a sub-mortgage of the mortgage afterwards, with notice, his rights are referred to the date of the winding up, and cannot be higher than the rights against the Company then were.

I think there is an analogy between this case and that of *The China Steamship Co.*; *Ex parte Mackenzie* (3). There Low was a

(1) 3 De G. & J. 294. (2) L. R. 3 Ch. 355. (3) L. R. 7 Eq. 240.

shareholder of the Company, and also a debenture holder. On the 19th December, 1866, a resolution was confirmed to wind up the Company, and on the 1st March, 1867, Low assigned the five debentures to Mackenzie, and notice of the assignment was given to the liquidator: calls were subsequently made on the shareholders, and Low was indebted to the Company for them. The question was whether Mackenzie could prove for the debentures without setting off the calls. It was held that the call was a debt due from the first, but only payable from the date of the call declared. There was a *debitum in præsenti solvendum in futuro*. The debt became due at the winding up, which fixed the rights, and the owner of the debentures could not afterwards assign them, so as to get rid of the liability for set-off which attached to his position of shareholder, though it would be otherwise if the assignment took place before the winding up.

The very point involved in this part of the case arose in *Ex parte Colborne and Strawbridge* (1). There the Company, through its directors, issued to vendors of land debenture bonds, binding themselves to pay the bearer. It was admitted that there were subsisting equities between the Company and the debenture holder. The Company was ordered to be wound up, and after the resolution for winding up, Strawbridge purchased for value certain of the debentures without notice of the winding up, and he was subsequently paid interest. The case was ultimately decided on the form of the debentures; but on the question of the purchase after the winding up it was contended for the liquidator that the winding up order fixed the rights of all parties, and that it was incumbent on one who bought afterwards to show that there was a debt due at the date of the winding up. Vice-Chancellor Malins held that Mr. Colborne was protected, but on the express ground that he had no notice of the resolution to wind up, and the advertisement in the *Gazette* was only notice to those who saw it. In the present case notice is admitted.

I think that the effect of the statute is, that when the winding up order was made all the then uncalled capital, so far as not validly otherwise appropriated, became devoted to the payment of the general creditors, and that a person subsequently claiming through an invalid mortgage, with notice of the statutory appropriation of all the uncalled capital, cannot get a title against the Company higher than the mortgagee he derived under. When the winding up order was made the Company ceased to exist save for the purpose of realizing its assets and distributing them. The Company, as Sir George Jessel says, in *Re Burgess* (1), became a body of contributories, and creditors and contributories also acquire rights at the date of the winding up, and by virtue of it.

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(1) L. R. 11 Eq. 478.

For these reasons I think the appeal must succeed, and the claim of Mr. Williamson in respect of his advances be limited accordingly.

HOLMES, L.J. :—

This Company, which was registered in February, 1895, is now being wound up, pursuant to an order of the Master of the Rolls, dated the 14th December, 1897.

It seems strange that a Company promoted in London, and having no connection in business or otherwise with Ireland or things Irish, should be registered in this country; but the explanation given by counsel of this apparent anomaly, if in one sense unsatisfactory, is at least intelligible. The Companies (Winding Up) Act, 1890, applies to England only; and the origin as well as the subsequent history of this undertaking shows that a desire to escape its provisions was not unnatural. The winding up order was made after a hearing of four days; and I gather from the judgment of the Master of the Rolls, then delivered, that the Company was a choice specimen of the promoter's handiwork.

Its sole begetter was an uncertificated bankrupt called Lupton; and the share capital, consisting of 500,000 shares of 10*s.* each, was allotted to two persons nominated by him. Of these shares 50,000 were issued as fully paid up, and 7*s.* 6*d.* was credited on each of the remainder. Of course Lupton was to all intents and purposes the Company, until his nominees could dispose of the shares to confiding investors. The list of contributories, however, shows that they were successful in doing so to a very large extent before the order for liquidation was made. Lupton supplied the Company with three directors and a solicitor. He also had or alleged that he had certain concessions or rights in South Africa, which I presume it was supposed that the Company would explore and develop; but the evidence on this point is very vague.

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(1) 15 Ch. D. 507.

It appears that before the registration of the Company, Lupton had arranged to give a mining engineer called Fauvel £1200 to go to South Africa and to report on certain properties which Lupton had control over. Although part of this sum—£400—was paid by way of retaining fee, this project was never carried out. Fauvel was made a director of the Company, and became chairman of the Board on the 11th March, 1895. I need hardly say that this was the doing of Lupton, who supplied the necessary share qualification, and whose relations with Fauvel are described by the latter in one pregnant sentence —"I was entirely in his hands."

Fauvel's proposed journey having been abandoned or postponed on his becoming chairman of the Board, Lupton determined to send to Africa what is described as an expedition, and he directed Fauvel to select the persons to take part in it. There is no evidence as to the composition, the doings, or the result of this expedition. We only know that Lupton gave Fauvel three or four sums of money amounting in the aggregate to £950 to defray the cost of it.

It appears from the minutes of the Board dated the 27th May, 1895, that on that day "the solicitor tabled a mortgage deed securing to Mrs. Josephine Lupton the payment of the sum of £3400, and the same was read by the Secretary." The origin of this transaction seems to have been a conversation which took place in the previous March between Fauvel and Lupton. On that occasion the former pointed out to the latter the great necessity of their (meaning I suppose the directors) having some capital to work upon, as without it they were perfectly helpless. There is a delicate ambiguity about the phrase "capital to work upon" taken in connection with the then position of the Company. What work did the directors propose to engage in, and who were to be benefited by it? At that time the whole of the share capital was under the control of Lupton; and did not, as far as I can see, represent one shilling of actual cash. It is impossible to believe that either Lupton or his nominees ever contemplated that any work would be done for the purpose of earning a dividend. The great object must have been to enable Lupton to dispose of the shares; and to do this it was necessary to make the Company, which had been brought out without a prospectus, known to the public. Its financial helplessness was of no consequence to anyone except to its staff of officers and to Lupton; and he was naturally asked to supply the means of promoting an activity by which he could be the only gainer. Accordingly, he agreed to lend £2050; and the Board minute book under the date of the 14th May records, "The promoter attended, and the question of the Company's financial position was fully discussed, with the result that Mr. Lupton undertook to provide forthwith £250 to open a banking account, and further undertook to make up the sum to £2050 on the day following the next Stock Exchange settling day, May 24th, 1895, a charge to be given on the uncalled capital of the Company to the extent of £3000." There is no doubt that the difference between £2050 and £3000 represented the £950 paid for the equipment of the expedition to South Africa; but it does not appear from the minute-book (at least in so far as it has been referred to during the argument) that this matter was then debated or had ever been brought before the Board on any previous occasion. It is recorded that on the 10th March, Fauvel's proposed journey was discussed; and it was then stated "that arrangements had already been made with him and a retainer of £400 paid to him by the promoter, who had agreed to pay him a fee of £1200 in all, the balance being payable before sailing." It was also stated "that this proposition was agreed to and approved"; and that it was further agreed "that an allowance should be made for expenses, Mr. Lupton undertaking to provide the necessary funds." The mortgage deed which was placed on the table on the 27th May was prepared by Mr. Watts, Lupton's solicitor, who was also called the solicitor of the Company; and when its contents were disclosed, the jump from £3000 to £3400 was too much even for Lupton's own directors. When it was explained that the additional £400 represented the retaining fee paid to Fauvel, they protested on the ground that not only this sum, but the whole of the £1200 which Fauvel was to receive, was to be defrayed by the promoter. The solicitor, however, suggested that it would be expedient to place no obstacle in the way of getting the £2050, and that the question of the £400 might be arranged at some future time, whereupon after considerable discussion it was resolved to execute the document as engrossed. That the question of the £400 should stand over, and that at the same time the seal of the Company should be put to a mortgage including it, could hardly have been intended as a serious suggestion.

The truth is that the Board, like its chairman, being entirely in the hands of Lupton, felt that it must yield to his terms, and as far as it could give validity to the transaction, the deed then sealed was a good security for the sum of £3400; nor were Lupton's rights strengthened by the substituted mortgage given on the 9th October, 1895, by the same Board, for the purpose of postponing his charge to that of Brown, Jansen & Co.

The first question to be considered upon the present appeal is whether if there had been no subsequent transfer of the mortgage debt, and if Lupton himself were now claiming as creditor, his claim ought to be allowed for the full amount. The liquidator has not denied that Lupton or his assignee would be entitled to prove for £2050, and interest thereon. As this sum was actually advanced upon the terms that it should be secured by a mortgage of the uncalled capital, the liquidator is satisfied that it should now be repaid out of the pockets of the present shareholders; and it is not for me to say that he has not exercised a wise discretion. He disputes, however, the remaining £1350.

Although the decision of the Master of the Rolls rested upon other ground, he dealt briefly with this aspect of the case in the course of his judgment. So far as the £950 is concerned, he was of opinion that it "was a payment which under the circumstances it would not be *ultra vires* for the directors to adopt"; and he was unable to say that it was fraudulent to include it in the mortgage. He, however, considered that the £400 stands upon a wholly different footing. He said that the inclusion of it in the mortgage "was nothing more or less than a fraud upon the Company—that is the shareholders—by making them liable to pay out of calls to be made upon them the private debt of Lupton."

While I agree as to the £400, I am unable to take the lenient view of the Master of the Rolls regarding the £950. It would not, I think, be difficult to show that the very existence of the Company was a fraud, to which all its officers were conscious parties; and that every step taken by them was in furtherance of such fraud. But I do not rest my judgment on such general grounds. I content myself with the proposition that having regard to the position of Lupton and the Company, and to the relations in which he, the directors, and the solicitor stood to one another at the date of the mortgage, the burden is on Lupton or his assignee to show that from the point of view of the shareholders who would be obliged to pay the debt the transaction was just, fair, and reasonable. So far from this being established, the inference I draw from the evidence is all the other way. When Lupton agreed with Fauvel that the latter should receive £1200 and his expenses for going to Africa, it cannot be argued that it was intended that the Company was to be made liable therefor. The Company at the time had not come into even a nominal existence. The services were to be rendered in the interest and for the benefit of Lupton alone; and if the project had been carried out and Fauvel had been paid, pursuant to the agreement, the remainder of the £1200 and his expenses, it would have been just as fraudulent to have included those amounts in a mortgage of uncalled capital, as it was to include the £400 actually paid.

When Lupton employed Fauvel for a different purpose the expedition took another shape; but the object was the same, and there ought to have been the same paymaster. The inference I draw from Fauvel's evidence is that the expenses advanced through him were not to fall on the Company; and until the day the mortgage was executed there was no obligation on the Company to pay them. Therefore the recital in that instrument that the Company was indebted to the mortgagee in the sum of £1350 was false. I admit that it is within the power of a Board of Directors to treat services rendered or money paid voluntarily and without contract for the benefit of their

Company as entitled to be rewarded, and to make provision accordingly. If this were done by an independent Board of Directors of a genuine Company, I think that their action ought not to be challenged except upon clear grounds; but this observation cannot apply to a case like the present, where there was only a nominal Company before Lupton disposed of his shares, and where in the meantime its only representatives were Lupton's creatures. It is not shown how the Company was interested in the expedition. It is not suggested that it derived any benefit from it. All we have been told is that once or twice telegraphic communications with it are referred to in the minutes of the Board.

Under these circumstances, I am unable to hold that if Lupton were himself the claimant, he would be entitled to be paid either the £950 or the £400 out of the uncalled capital; and it has not been argued that his wife, whose name was used in the mortgage deed at his request and for his convenience, stands in a better position.

This brings me to the second branch of the case, which was that principally considered by the Master of the Rolls. Upon the 26th April, 1898—four months after the date of the winding up order—the mortgage debt for £3400 and the security therefor were transferred by Mrs. Lupton to Arthur Williamson. The circumstances that led to and accompanied this transfer, as detailed by Mr. Williamson and his solicitor, are very peculiar. The former, who describes himself as a banker, carrying on business in the city of London, says that in March, 1898, Mr. Benjamin, a solicitor practising in the same street, asked him whether an advance of about £3000 on a first-class security would be entertained by him or his firm. Mr. Benjamin then, in a conversation which did not last more than five minutes, gave roughly a few particulars, confined as far as I can gather from the evidence, to a statement that the security consisted of a mortgage for £3400 of the uncalled capital of a Company, then in liquidation, but having a large sum of money in hand. The mortgage deed was not produced; but I assume that the names of the Company and of the mortgagee were mentioned. This information, however, could have conveyed nothing to Mr. Williamson, as he had never heard of the Company before, and the only thing he knew of Mrs. Lupton was that she was the wife of a man who had once had an office in the same street, but with whom he had neither social nor business relations. He said he knew him by reputation; and the nature of the reputation can be gathered from his answer to the next question—"I simply knew him as a man that I would not care to ask to my house."

The result of the interview was that Williamson considered the security so attractive as to justify a reference to Mr. Digby, his own solicitor—"I put myself to the expense," he said, "of sending Mr. Benjamin to my solicitor. I satisfied myself that I was getting an apparently good security." At the same time he explains in another part of his evidence that it was "not altogether a security of a nature that I should have taken at 5 per cent. per annum"; and although "money was very cheap at the time—2 per cent.—I thought that it should be 10 per cent. on this loan."

It would not have occurred to me, before reading Mr. Williamson's evidence, that a London banker would have been so easily satisfied that he was getting "an apparently good security." Notwithstanding his belief that Benjamin was a respectable man, I should have expected him to make some inquiries as to the Company, what its business was, why it was in liquidation, what was the amount of its unpaid share capital, how much money there was in hand, and why Mrs. Lupton did not apply to be repaid thereout instead of borrowing at 10 per cent.

But if the methods of the banker cause me some surprise, they show prudence and foresight when compared with Mr. Digby's mode of doing business. Williamson evidently knew and trusted Benjamin, and may have assumed that his own solicitor would have looked into details; but Digby had not only never heard of Lupton or the Company, but his acquaintance with Benjamin was extremely slight. He was, moreover, handed the mortgage of the 9th October, and must have seen on the face of the document that it was unstamped, and that the whole of the share capital had been issued either as fully paid up or with 7*s.* 6*d.* credited on each share. He was also told that there had been a previous mortgage of the uncalled capital to Brown, Jansen, & Co., for £13,000;

and yet he was not led to make any inquiries about the Company. I assume, in his favour, that he satisfied himself that such a Company actually existed; but, if he had done so, he would have known that within nine months after registration it had mortgaged its uncalled share capital to secure £16,400, and he might reasonably have inferred that it had, at the date of these loans, no other property upon which it could borrow. He was also aware that it was being compulsorily wound up in the third year of its existence, and if he had learned, as he says he did, that the mortgage given to Brown, Jansen, & Co. had been nearly paid off, it was only a stronger reason for ascertaining whether any uncalled capital remained to meet further demands. He tells us that he proposed to go and see the liquidator; but, on being informed that this officer was in Ireland, he did not communicate with him until after completion. I confess that there is nothing in Mr. Digby's evidence that astonishes me so much as this. We know the not unnatural suspicion with which English capitalists have for some years past regarded Irish investments. But I should have thought that an estate in the most congested part of our western seaboard would prove a gilt-edged security compared with any security which an Irish Company, professing to be engaged in exploring and developing something in Matabeleland, would have to offer.

Still surprising as the whole transaction appears, the result was that in return for two cheques, one for £2750 and the other for £100 given to Benjamin, Mrs. Lupton's mortgage was assigned to Williamson, to secure these sums, with interest thereon, at ten per cent. per annum. The cheques were not produced in Court; but Williamson gave an explanation of this omission, and I have little doubt that if there had been an adjournment they would have been forthcoming.

And yet with every anxiety to avoid reflecting upon the evidence of these two witnesses, I am obliged to say that their story as it stands is to my mind hardly credible. I feel that there is something wanting—something withheld. Williamson had evidently great confidence in Benjamin; and it may be that his real security was a knowledge that Benjamin would save him harmless.

If this were the foundation of the transaction, I can well understand that inquiries would be out of place. If the banker was expected to assume the role of an "innocent holder" he would ask no questions. Lupton would never have ventured to put forward a claim under the mortgage in his own name or that of his wife; and he would naturally look for some one who could show a better equity. A tacit understanding of this kind between Williamson and Benjamin would be consistent with all the rest of the evidence; and as far as I am concerned I am unable to accept it on any other theory.

A jury whose incredulity in cases of this kind I have generally found to be of a robuster type than my own, would probably reject the testimony of Williamson and Digby altogether; and perhaps they would be right in doing so. But the Master of the Rolls who heard them, does not seem to have disbelieved the main outlines of their story; and I adopt the same view with the modification I have mentioned. I have thought it desirable to examine the circumstances connected with the transfer of the mortgage before considering the legal question to which such transfer has given rise. The proposition relied on by counsel for the respondent is that whatever may have been the rights of Lupton under the mortgage, Williamson having taken an assignment of it for valuable consideration and without notice that it was not what it purported to be, is entitled to have it treated as a security for the full sum of £3400.

That the assignee of a *chose in action*, although without notice, in general takes it subject to all the equities which subsist against the assignor is a familiar principle. It is unnecessary to inquire into its origin, inasmuch as it has long since taken the place which it still retains amongst legal axioms. It is, perhaps, most frequently referred to in connection with the great exception which excludes negotiable instruments from its operation. Indeed I am disposed to think that the chief service of the rule has been to explain and give point to the exceptions to it. Long ago, Lord Hardwicke said that "length of time and circumstances may vary it and and make the case of the assignee stronger": *Hill* v. *Caillovel* (1); and in the present day it seems to have resolved itself

(3) 1 Ves. Sen. 122.

into a contest of merits, the right of the assignee being recognised if his merits are greater than the merits of his opponent. This is illustrated in *Bickerton* v. *Walker* (1), the case on which the Master of the Rolls rested his judgment in favour of Mr. Williamson. There the plaintiffs had mortgaged their interest in a sum of stock and certain policies of assurance for £250, the payment of which was acknowledged in the deed, and a receipt for which was endorsed thereon. The mortgagee afterwards transferred the mortgage to a person who gave full value for it on the assumption that it secured £250, and who made no inquiries from the mortgagors. As a matter of fact the plaintiffs had only received £91 of the specified consideration; and the action was brought by them for a declaration that the mortgage should stand as a security for that amount only. It was held that inasmuch as the plaintiffs were inexact and careless in placing in the hands of the original mortgagee and their common solicitor the means of deceiving other persons, and inasmuch as the transferee had not been guilty of negligence or want of care, the latter had the greater merits and was therefore entitled to judgment.

I should think that everyone must admit the soundness of this decision, but it is not applicable to the present case. Here the mortgage debt is to be paid by the contributories, and the security was their liability to calls. It cannot be said that there was any carelessness or other demerit on their part, for even if there were any contributories when the mortgage was concocted, which I doubt, they had no control or voice in the management of the Company. On the other hand, if I am right in inferring from the evidence that Williamson and Digby wilfully shut their eyes lest if they kept them open they would discover the infirmity of the security, their conduct would be indefensible. Even if I have drawn an erroneous inference in this respect, they cannot escape the imputation of a reckless disregard of circumstances calculated to put any reasonable man on inquiry; and this in itself would be a demerit sufficient to place them in a worse position than the contributories. They had, moreover, distinct notice that the Company previous to the transfer had been ordered to be wound up; and I think that this alone would be a good answer to their claim to be in a better position than their assignor. The winding-up order put an end to the Company as an independent entity. It thenceforth continued to exist only for the purpose of collecting and distributing its assets according to the rights of the parties interested at the date of the order; and it would be, I think, inconsistent with the essential nature of the proceedings if more extensive rights against the Company, its property, or its contributories, could be acquired by virtue of subsequent dealings behind the back of the Court and the liquidator.

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(1) 31 Ch. D. 151.

In re Imperial Land Company of Marseilles; ex parte Colborne and Strawbridge (1) is a case that turned upon whether debenture bonds of a company were negotiable instruments, and, therefore, whether holders for value without notice of the equities were entitled to prove for the amount due free from equities. It was held that the bonds were negotiable; but I gather from the arguments and judgment that even in such a case a purchase of the bonds after the resolution to wind up *with notice thereof* would have made the purchases subject to the original equities. For these reasons I am of opinion that the appeal ought to be allowed, and that the order of the Master of the Rolls must be varied in the way asked for by the appellant.

Solicitor for the liquidator: *Shannon.*
Solicitor for Williamson: *Kennedy.*

G. Y. D.

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(1) L. R. 11 Eq. 478

In the MATTER of RICHARD SMITH & CO., Limited.

M. R.
1900.
Feb. 19.
March 12.

Company—Debenture—Deposit of by registered holder with bank—Right of set-off by Company against registered holder—Equities disregarded.

The registered holder of debentures issued by a limited Company deposited them with a bank to secure advances, but no transfer was executed, nor any notice of the deposit given to the Company. At the date of the deposit and of the winding-up the registered holder was indebted to the Company in a larger sum than the amount of the debentures, and was also indebted to the bank in a less sum for advances. The conditions of the debentures provided that the registered holder would be regarded as exclusively entitled to the benefit of the debentures, and that all persons might act accordingly, that the Company should not be bound to enter in the register notice of any trust, or to recognize the right of any other person, save as therein provided; that the money secured by the debentures would be paid without regard to any equities between the Company and the original or any intermediate holder thereof, and the receipt of a registered holder for such money should be a good discharge to the Company:—

Held, that the Company was entitled to set off the amount due to it from the registered holder as against the amount of the debentures payable to him, and that the Company was not bound to have regard to the claim of the bank as against the registered holder.

Summons.

This was an application on the part of David Telford the liquidator, to take the decision of the Court as to whether the liquidator was entitled to set off the amount payable in respect of four mortgage debenture bonds for £50 each of the Company (which bonds were deposited by Richard Smith, the registered holder thereof, with the Bank of Ireland) as against a similar amount of a debt due by the said Richard Smith at the date of the said deposit to the Company, and for a declaration that the said right of set-off was not affected by any claim of the Bank on the said debenture bonds.

The facts of the case were as follows:—The Company was incorporated on March 6, 1890, under the Companies' Acts with a nominal capital of £12,000, the entire of which was issued either as fully paid up or paid for. By the Memorandum of Association the Company was empowered to raise money by issuing debentures charged on the whole or any part of the property of the Company, both present or future, and the articles of association empowered the directors to issue debenture bonds not exceeding £6000.

At a general meeting of the Company held on March 24, 1890, the directors were directed to issue forthwith £6000 in debentures charged upon the whole of the property of the Company, both present and future; on March 25, 1890, ten mortgage debenture bonds of £50 each were issued by the Company to James S. Murphy and C. H. Fitt, whereby the Company undertook on December 24, 1895, or on such earlier day as the principal moneys thereby secured became payable in accordance with the conditions endorsed thereon, to pay to the said James S. Murphy and C.H. Fitt, or other the registered holder for the time being, the sum of £50. The conditions endorsed material to the present case were as follows:—

"3. The registered holder will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the Company shall not be bound to enter in the register notice of any trust or to register any right in any other person save as herein provided.

"4. Every transfer of this debenture must be in writing under the hand of the registered holder or his legal personal representative. The transfer must be delivered at the registered office of the Company with a fee of 2*s.* 6*d.*, and such evidence of identity or title as the Company may reasonably require: and also this debenture (if thought necessary by the Company), and thereupon the transfer will be registered.

"6. The principal moneys and interest hereby secured will be paid without regard to equities between the Company and the original or any intermediate holder thereof, and the receipt of a registered holder for such principal moneys and interest shall be a good discharge to the Company.

"7. The Company may at any time give notice in writing to the registered holder hereof, his executors or administrators, of its intention to pay off his debenture, and upon the expiration of six calendar months from such notice being given the principal moneys hereby secured shall become payable.

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"10. The Company may require the production of this debenture before payment of the principal money hereby secured, and upon payment of such principal money this debenture shall be delivered to the Company."

James S. Murphy and C. H. Fitt by a deed of transfer of September 23, 1857, in consideration of 5*s.* assigned four of the said mortgage debenture bonds of £50 each, No. 27 to 30, both inclusive, to Richard Smith absolutely.

Richard Smith was one of the original promoters of the Company, and one of its directors. In March, 1890, he was indebted to the Company in a sum of £1127 3*s.* 4*d.* on a promissory note passed by him for that amount to the Company, and he continued so indebted to the Company; he was also indebted to the Company at the date of the resolution for voluntary winding up, which was passed on January 3, 1899, in the sum of £285 2*s.* 4*d.* in respect of salary overdrawn by him.

By letter of February 8, 1898, Richard Smith deposited with the Limerick branch of the Bank of Ireland the said four debentures to be held as collateral security for advances to him by the bank, and by this letter he authorised the bank to sell the debentures and apply the proceeds towards repayment of the sum due on such advances, and he undertook to do all acts necessary to enable the bank to carry out the sale. No transfer, however, was executed by him to the bank, and no notice of the deposit was given by the bank to the Company.

On January 17, 1899, a petition for the compulsory winding up of the Company was presented by a creditor, and on January 25, 1899, an order continuing the voluntary winding up under the supervision of the Court and continuing David Telford as liquidator was made.

On August 25, 1899, the bank applied to the liquidator, who was paying off the debentures in full, for payment of the sum of £90, being the amount due by Richard Smith to them, and for which they held the debentures as security. The liquidator declined to pay the amount without an order of the Court, and this summons was taken out accordingly by him.

Ignatius O'Brien, Q.C., for the liquidator.

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Jonathan Pim, for the Bank of Ireland.

The following authorities were referred to:—*In Re Blakely Ordnance Company, Ex parte New Zealand Banking Corporation* (1); *Bickerton* v. *Walker* (2); Palmer's Company Precedents, 7th Edition, vol. i., pp. 762, 824.

March 12.

THE MASTER OF THE ROLLS:—

A question was raised by the bank, grounded on the Statute of Limitations, as an answer to the claim of the Company. That has, however, been met and disposed of by showing that salary due to Richard Smith was set off and duly credited to his account from time to time, and at dates which if the entries are genuine preclude the statutory bar. Of the genuineness of the entries and credits there is no question, and this point was virtually abandoned, though I do not say that it was actually given up.

The real matter in controversy is whether the bank (whose position as creditors of Smith, for some £90 is not denied) have acquired by the deposit with them of the four debentures an equity superior to that of the Company, so as to entitle them to payment of their demand by the Company, even though as between the Company and Smith the latter could have sustained no claim against the former.

This must depend largely on the form and wording of the debentures. [The Master of the Rolls here read the debenture.]

It will be observed that the word assigns does not occur, nor does any equivalent expression, in any part of the debenture or of its conditions. The money is payable to the mortgagee "or other the registered holder for the time being" who is to be "regarded as *exclusively* entitled." The Company is not bound "to recognize any right in any other person." In case of death, the "legal personal representatives" and the "executors or administrators" are to stand in his place. Thus both by positive and negative language (for the word "*exclusively*" is really negative, and is the same as "and no one else") the intention is manifested of restraining all transfers of the security to one particular class, viz. that of persons who shall take the trouble of becoming registered holders.

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(1) L. R. 3 Ch. 154.

(2) 31 Ch. D. 158.

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These debentures differ totally from those in which the Courts have been able to see an intention to confer value upon these mortgage securities by putting them upon the market as negotiable instruments, or as nearly of that kind as the circumstances would admit. They seem to have been carefully and elaborately framed to avoid this consequence. The condition, No. 7, enabling the Company to pay off the principal to the registered holder, after a notice such as is usual in ordinary mortgages, would in any given case practically deprive a person claiming by equitable deposit of any benefit from his security—since he would not know of it; for though the Company "may" call for the debenture (condition 10), they need not, and if they did, might be deceived by a false statement of the loss or destruction. In any case payment to the registered owner, in the absence of *mala fides*, would discharge the Company.

Why the bank did not take a transfer in regular form, I do not know, since no liability could attach by virtue of their doing so. As it is, they have neglected a most obvious and in this case essential step; and in my opinion have no equity superior to, or indeed so good, as that of the Company.

I have so recently, and at such length, considered all the cases bearing upon the question in *In re Gwelo Company* (1)—a case in which I gave liberty to the liquidator to appeal, that I content myself now with saying that the Company is entitled to the set off it claims, and that the bank can only stand in the place of Smith in respect of any surplus.

Solicitors for the liquidator: *Scallan & Company.*
Solicitor for the Bank of Ireland: *Malcolmson.*

W. L.

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(1) Since reported—[1901] 1 Ir. R. 38.

Ross, J.
1900.
Jan. 28, 29.

IN THE MATTER OF THE ESTATE OF JOHN CARROLL, OWNER; WILLIAM AMHERST AND TYSSEN AMHERST, PETITIONERS.

Mortgage—Interest—Provision for reduction of, on punctual payment on gale days in "every" year—Default in punctual payment—Over-payment of interest treated as payment of capital.

A proviso for reduction of interest on a mortgage debt, on payment upon the gale days therein named "in every year," or within sixty days then ensuing, and that the mortgagor should not be entitled to the benefit thereof while any interest previously accrued due should remain unpaid, only deprives the mortgagor of the benefit of reduction in each gale where the interest is not paid punctually.

Over-payments of interest are to be treated as payments of principal *pro tanto.*

THIS matter was placed in the Judge's list by the Examiner for directions as to the vouching of the final schedule of incumbrances.

The petitioners were the first incumbrancers on the estate. All the lands had been sold, and the purchase-money had been sufficient to discharge the entire of the petitioner's mortgage in the year 1887, except a sum of £70. The lands had been sold through the Irish Land Commission, and there was retained in respect of the sale a sum of £360 guaranteed land stock. On the 27th July, 1887, the solicitor for the petitioners having carriage obtained *ex parte* an order declaring the petitioners entitled until further order, to be paid the interest and dividends of this guarantee deposit. Under this order the petitioners had received half-yearly a sum of £5 4*s.* 5*d.* down to the 1st November, 1897.

The guarantee deposit was now set free, and an account was being taken before the Examiner, with a view to ascertain what claims were against it. The petitioners claimed that they were entitled to the principal sum of £70, with interest thereon for twelve years at six per cent., amounting to £56, less income tax, and they gave credit as against these claims for the sum of £114, being the aggregate of the several payments of the interest on the guarantee deposits, leaving a balance due to them of £12.

Messrs. Hardman, solicitors for Mr. Storey, who was the next incumbrancer, submitted that as the amount received by the petitioners in each year in respect of the interest of the guarantee deposit exceeded the amount of the interest to which they were entitled under their mortgage, the over-payment must each half-year be credited against principal, and they represented that if this were done all principal and interest due on the petitioner's mortgage was paid, and that as they had been receiving the interest on the guaranteed deposit they were now overpaid, and must refund the sum of £30. They also contended that the petitioners were entitled to interest at the rate of £5 per cent. only.

The following was the proviso as to the reduction of the rate of interest from six per cent. in the petitioner's mortgage, dated the 7th August, 1855 :—" Provided always, and it is hereby mutually agreed and declared between" the parties, " that in case" the mortgagor " shall pay to" the mortgagee " interest at the rate of five per cent. per annum, by even and equal half-yearly payments on the 7th day of February and 7th day of August in *every* year, or within the space of sixty days then next respectively ensuing, then in consideration of such punctual payment," the mortgagee " will accept the reduced rate of interest aforesaid in satisfaction of the interest hereinbefore covenanted to be paid. Provided nevertheless, and it is hereby expressly declared that the said John Carroll, his heirs or assigns, shall not be entitled to the benefit of this present covenant while any interest previously accrued shall remain unpaid."

The interest on the petitioner's mortgage had been for four years, 1882 to 1886, entirely in arrear, no payment having been made in respect of it during those years; and the arrears were not discharged until some time in the year 1898.

G. Y. Dixon, for the petitioners :—

The effect of this proviso is that the mortgagees must accept the reduced interest if that reduced interest is paid punctually on the days named in " every " year ; the mortgagor made default in paying the interest for several years, and therefore he has not paid it punctually in "every" year: the proviso has therefore ceased to operate; the agreement must be read strictly; it is a covenant to pay 6 per cent. with a proviso that 5 per cent. will be accepted until default be made, but that once default is made the 6 per cent. rate is payable thereafter; the proviso is not to be read as if the word "any" were substituted for "every." The proviso is in the form adopted by conveyancers where it is intended that one omission to pay interest at the prescribed date stops the right of reduction: see Key and Elphinstone, Ed. 5, vol. ii., p. 31.

The petitioners cannot be compelled to accept payment of their principal in small sums: the amounts in excess of their interest paid to them each half-year ought not to be treated as payments then made on account of principal so as to reduce the interest bearing debt in each half-year: *Blandy* v. *Kimber* (1).

J. Leech, for Mr. Storey: —

The proviso for reduction of interest still enures for the benefit of the mortgagor notwithstanding the default: *Rocella's Estate* (2) is an *a fortiori* case. There is no case cited in support of the note in Key and Elphinstone, and that note is contradicted by *Rocella's Estate* (2). The proviso following the proviso for the reduction of interest shows that it was not intended that a single default should deprive the mortgagor of its benefit.

As to the payment each half-year, it must be credited when paid as against interest first, and so far as interest does not exhaust it as against principal. The petitioners by receiving the entire amount of the interest on the guarantee deposit deprived us of all interest during twelve years.

Dixon, in reply:—

Rocella's Estate (2) was the case of the non-payment of a single half-year's interest through an oversight; and is therefore distinguishable. The subsequent proviso is only added by way of caution: it cannot extend the clear words of the proviso reducing the interest only in the event that it is always paid punctually.

(1) 25 Beav. 537.

(2) 32 Ir. L. T. R. 8.

Ross, J. 1900. In re Carroll's Estate. Jan. 29.

Ross, J.:—

I am bound by the authority of *In re Rocella's Estate* (1) which was argued before me. Here the words are "every year," and there "every" gale day.

I therefore must give a direction to the Examiner that in taking that account to allow interest at the rate of 5 per cent., and to treat all payments made exceeding the amount of interest as payments of principal *pro tanto*.

Solicitor having carriage: *J. A. French.*
Solicitors for Mr. Storey: *Hardman & Sons.*

W. C. S.

M. R. 1899. June 7, 8, 9. July 27. Dec. 19.

IN THE MATTER OF THE ESTATE OF JOHN CAREY, DECEASED; JOHN MITCHELL, JOHN AICKEN, AND ROBERT DAVISON *v.* JAMES EWING, JOHN M'ELVEY, AND HER MAJESTY'S ATTORNEY-GENERAL FOR IRELAND.

(1893. No. 861.)

Charity—Interest in land—Revocation of registered deed by unregistered deed—The Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 *Vict. c.* 97, *s.* 16)*—Transfer of bank shares and after-acquired property—Imperfect gift.*

A testator, prior to making his will, by registered deed conveyed to trustees real and personal estate, to hold upon trust for himself for life, and after his death for charitable purposes, as therein mentioned, reserving to himself a power of revocation. By a further deed, made in pursuance of this power, the testator purported to revoke and alter certain of the trusts in the former deed. He also conveyed to the same trustees further real estate and chattels real, and also certain bank shares, and all future property to be acquired by him for the same and further charitable purposes. The deed was not registered. The testator afterwards made his will, and bequeathed other property to the trustees of the deeds, upon the same trusts, but appointed no executors or residuary legatees. On his death administration, with the will annexed, was

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(1) 32 I. L. T. R. 8.

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granted to one of his next-of-kin. The trustees brought an action to carry out the trusts of the deeds and will, and to have the real and personal estate of the testator administered. The testator left a considerable amount of property, acquired after the execution of the second deed. No transfers of the bank shares were ever executed.

7 & 8 Vict. c. 97, s. 16, invalidates a donation for charitable purposes in Ireland of any estate in lands for such uses, unless the deed containing the same is registered in the Registry of Deeds within three calendar months after execution:—

Held, (1) that so far as the second deed purported to revoke the trusts of the first deed, it was operative although not registered; (2) that, so far as it affected to create new charitable interests in the lands, it was invalid by not being registered; (3) that neither the bank shares nor the after-acquired property passed by the second deed.

The *ratio decidendi* of *Atty.-Gen.* v. *Rye* (2 Vern. 453) and *Atty.-Gen.* v. *Burdett* (Ib. 755), aiding the defective execution of gifts for charitable purposes does not apply to Ireland, the English and Irish statutes as to charitable uses being dissimilar.

FURTHER CONSIDERATION.

This action was brought—1, to have the trusts of two deeds executed by the deceased, John Carey, carried into execution, and if necessary, to have a scheme settled, and 2, to have the real and personal estate of the deceased administered and the trusts of his will carried into execution.

The material facts of the case were as follows:—John Carey, late of Toome, in the county of Antrim, was in his lifetime, and at the times of executing the deeds and will hereinafter mentioned, possessed of very considerable real and personal estate. By a deed, dated May 24, 1880, the said John Carey conveyed and assigned to William John Mitchell and Robert Davison (two of the plaintiffs), and John Wilson, their heirs, executors, and assigns, a large amount of real and personal estate to hold, upon trust, for the said John Carey, for life, and after his death for various charitable purposes, as in the said deed mentioned. The deed reserved to John Carey the power of declaring any further or other trusts, either in addition to or in substitution for the trusts in the deed declared. The deed was duly registered on May 26, 1880.

By a further deed, dated November 15, 1888, purporting to be made in pursuance of the power reserved in the deed of May 24, 1880, and by what is called an agreement and memoranda attached thereto, John Carey purported to revoke and alter certain of the trusts in the previous deed contained. He also conveyed and assigned to the same trustees further real estate and chattels real and also certain shares and stock (pure personalty), and all future property to be acquired by him, for the same and further charitable purposes as herein mentioned. The deed did not contain any habendum or words of limitation of estate. It appeared to have been drawn up by John Carey himself, and was duly executed and attested in the presence of two witnesses, but was not registered.

John Wilson, one of the trustees, died on April 21, 1889, and the plaintiff, John Aicken, was appointed in his stead by the Session and Committee of the Presbyterian Congregation of Duneane, in accordance with the provisions of the deed of May 24, 1880, but the trust property was not vested in him. By his will, dated August 19, 1891, John Carey bequeathed other property to the plaintiffs upon the same trusts, he appointed no executor nor residuary legatee, and died on August 23, 1891, without having altered or revoked his will; administration with the will annexed was granted on October 4, 1893, to the defendant James Ewing, one of the next-of-kin of the deceased.

The defendant John M'Kelvey, was alleged to be the heir-at-law of the deceased.

Messrs. Glover and M'Guckin, solicitors, issued a summons in the Court of the Master of the Rolls, against the defendant, James Ewing, as creditors for costs, claiming administration of the estate of the deceased, and by order, dated December 12, 1893, the proceedings in that matter and this action were consolidated.

By the deed of May 24, 1880, after reciting amongst other matters his desire that the trustees, to whom he was desirous of granting and assigning the lands, tenements, and hereditaments thereinafter described, should apply the rents and profits thereof, after payment of outgoings and other charges, in maintaining the building situate upon certain of the said premises, and called and known as "The Temple of Liberty, Learning, and Select Amusement," thereinafter called "the said Temple," and in payment of the expenses of and incidental to the moral, educational and charitable objects for which the said temple was founded and

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built by him, and for other similar objects thereinafter expressed, and after reciting his desire to reserve to himself the power of declaring any further or other trusts, either in addition to, or in substitution for, the trusts thereinbefore referred to, and upon which the said trustees were to hold the said premises and apply the rents and profits to such further or other trusts to be declared and contained in a deed to be executed by him at any time during his life, and that he desired that the Faculty for the time being of the Magee Presbyterian College, in the city of Londonderry, or, in default of their accepting the trusts thereof, the Faculty of the Belfast Presbyterian College, should have and exercise certain powers and privileges in relation to the trusts intended to be thereby created and the management and carrying out of the same by the said trustees, John Carey granted and conveyed to the trustees certain freehold and leasehold premises, upon the trusts thereinafter declared.

The material trusts were as follows :—

1st. All the rents and profits to be under the sole management of the trustees, subject as thereinafter mentioned. 2nd. The trustees to pay head-rents, taxes, and other outgoings and costs of management. 3rd. The trustees to pay William Tillie, John Cooke, John Gamble, or other the trustees of a trust deed of even date, the biennial sum or rentcharge of £100, and to see that the money was faithfully applied to the maintenance of the Carey Lectureship, and to withdraw it if found at any time to be applied to any other object so long as the misapplication continued, but no longer. 4th. To pay a salary of £80 sterling a year to a male teacher, to be appointed by themselves and by the Faculty of the Magee College or the Belfast College, as the case may be, who shall act as a teacher in a school-room to be set apart for that purpose in the said temple, and to which boys of all religious persuasions shall be admissible at nominal charges, such school and teacher, and the management of such school, to be under the absolute control of the trustees, or one of them, jointly with the said Faculty for the time being acting as aforesaid, who shall have power to dismiss such teacher and appoint another in his place upon such terms as they may think fit ; and in case of difference of opinion on any question as to the appointment of said teacher in the management of the said schools as aforesaid, the same to be decided by a majority of the votes of the trustees and the said Faculty. The male teacher shall be qualified to teach the ancient classics, and prepare boys for entrance into any of the colleges, and to instruct rural pupils in the approved modes of agriculture. 5th. The trustees to pay a salary of £60 sterling a year to a female teacher to act as schoolmistress in a schoolroom to be set apart for that purpose in the said temple, and to which girls of all religious persuasions shall be admissible free of charge, such female teacher to be appointed and remain under the control of the trustees and Faculty in like manner as the male teacher hereinbefore referred to; an additional salary of £10 sterling to be paid to such female teacher for playing the organ in the said temple, and teaching the use of the same to her scholars. The female teacher shall be qualified to instruct her pupils in the ordinary domestic operations involved in household management, such as cooking, washing, sewing, nursing, milk management, ironing. The said schools, male and female, to be put in connexion with the National Board of Education, or any substitute affording public aid to education generally: Provided always that in case the trustees and Faculty shall at any time find that such schools, or either of them, cannot be carried on usefully for want of scholars, it shall be lawful for them to abandon either or both of the said schools, and the said sums of £80 sterling, £60 sterling, and £10 sterling, or either or any of them, shall in such event cease to be paid by the trustees to the said teachers, and the same shall from thenceforth be paid by the trustees rateably to and among the several other charities therein mentioned, save and except "The Carey Lectureship." 6th. The trustees shall keep the said temple secured against risk from fire in their own names, and shall keep the same in good and proper order, repair, and condition, and the same shall be under their sole and exclusive management in every respect. 7th. The trustees shall expend the sum of £20 sterling yearly in supplying books for the library of the said temple, such books to be selected by the Faculty of the Presbyterian College of Londonderry, or in case of their refusal, then by that of the said college in Belfast, and in case of the refusal of both the said Faculties for the time being so to select them, such books shall be selected by the said trustees themselves. The books in the library to be lent to the public, subject to such rules and regulations as shall from time to time be made by the trustees and Faculty, one book at a time to be lent to any person applying for same, upon his depositing one shilling as security, and paying 1*d*. per week for the use of such book, and also signing an undertaking to return the book or pay the value thereof: Provided that if such library be found useless, the money be applied rateably as above to the other objects of this trust. 8th. The trustees shall appoint either the said male or the said female teacher as librarian of the said library, and shall pay to the person so appointed an additional salary of £5 sterling per annum. 9th. The trustees shall pay to the treasurer for the time being of the foreign mission to the heathen in connexion with the General Assembly of the Presbyterian Church in Ireland, so long as there are heathen to be converted, and after that to gospel work at home in Ireland, the annual sum of £80 sterling. 10th. The trustees shall pay to the treasurer of the Home and Colonial Church Extension Scheme of the said Presbyterian Church in Ireland the sum of £30 sterling per annum. 11th. The trustees shall pay to the treasurer for the time being of the Hibernian Bible Society, so long as it continues to circulate the pure word of God, and, in default of this, to the Home Mission of the said Presbyterian Church in Ireland, £20 sterling per annum. 12th. The trustees shall pay to the treasurer for the time being of the Orphanage of the said Presbyterian Church in Ireland the annual sum of £20 sterling. 13th. The trustees shall pay to the Faculty of the said Magee College, Londonderry, in case the said Faculty shall act as major trustees of these presents, and only so long as and while they shall do so, the sum of £30 sterling per annum, to be the Carey Scholarship, to be awarded in equal moieties to the two students in the undergraduate and supergraduate courses whom the Faculty shall, having regard to their diligence, progress and character, consider the most deserving and promising students in the college that year: one-half of the amount of the scholarship shall be given in money, and the other half in books; these scholarships to be bestowed only once on the same student. 14th. The trustees shall pay to the Faculty of the said Magee College the sum of £30 sterling per annum, to found a scholarship to be called the Carey Foreign Mission Scholarship, for the support and education of a student for the Christian ministry during his undergraduate and supergraduate courses, who shall from the first devote himself to become a missionary to the heathen in connexion with the Foreign Missions of the said Presbyterian Church in Ireland. 15th. The trustees shall, on one and the same day in the month of November in each year, distribute publicly at the said temple bed-clothing or second-hand body-clothing of the value of £30 sterling per annum, among the poor of all denominations, supplying first those living within one mile of the temple, and, secondly, those living within two miles of the temple, and so on according to distance, the trustees to be the sole judges of the parties most deserving or needy. 16th. The trustees shall be at libesty to keep the sum of £5 sterling per annum for each trustee for his trouble in acting as such, and by such trustee, if any, as may be acting as receiver over the trust funds an additional sum of £5 sterling may be retained, with all his reasonable travelling or other charges incurred in the discharge of the said agency. 17th. If the income of the trust property shall in any one year exceed the sum of £500 sterling, then each of the annual sums or salaries hereinbefore directed to be paid shall be proportionably increased, except the student scholarships of £15 sterling each in the Londonderry or Belfast College, and the biennial sum of £100 sterling for the Carey Lectureship. 18th. And should the income of any year fall short of said amount of £500 sterling, all the said sums hereinbefore directed to be paid shall be reduced proportionately, except the salaries of the teachers, the three student scholarships, the said biennial sum for the Carey Lectureship, and the remuneration to the trustees. 19th. The Faculty of the Magee Presbyterian College, Londonderry, so long as they shall act as major trustees of these presents, and, after they shall cease to act as such major trustees, the Faculty of the Presbyterian College, Belfast, for the time being, shall have power to appoint, once at least in each year, at Christmas vacation of the college, one or two persons, being members of the said appointing Faculty for the time being, to visit the said temple. The trustees shall pay the reasonable travelling and other expenses of any such person or persons. 20th. The Faculty for the time being of the said Magee Presbyterian College, Londonderry, so long as they shall act as major trustees of these presents, and after they shall cease to act as major trustees, the Faculty of the said Presbyterian College, Belfast, for the time being, shall have power, upon one month's previous notice, to dismiss either or both of the said teachers. 21st. Upon the removal of any trustee as aforesaid, or upon the death, incapacity, or refusal to act of any local trustee, or upon the resignation, in writing, of any trustee, the new trustee to take the place of the trustee so removed, or dead, or becoming incapable, or refusing to act, or resigned, shall be appointed by the Session and Committee of Duneane Presbyterian Congregation, at a meeting to be convened for that purpose; the appointment to be made by a majority of votes, and to be made within one month after such removal, death, or resignation; such new trustee, or any trustee of these presents, to be a member of the Presbyterian Congregation of Duneane; a memorandum of such appointment to be made in some book, or on parchment attached hereto, and to be signed by the minister of the said congregation. 22nd. All receipts given for any moneys received under the trusts of these presents, and all receipts given for any moneys paid by the trustees, shall be in the joint names of the trustees for the time being, and no one trustee shall have power to pay or raise any sum except by the authority and in the names of all. 23rd. In case the said Faculty of the said Magee College, or the Belfast Presbyterian College for the time being, shall neglect or refuse for the space of one whole year to send such person or persons as they are hereinbefore authorised to send to the said temple for the purposes aforesaid, then, and in that case, and for so long as they both so refuse or neglect to appoint and send such person, the fund for the maintenance of the above three scholarships of fifteen pounds, sterling, fifteen pounds sterling, and thirty pounds sterling, shall cease to be paid by the said trustees, and the said amounts shall be paid to the other charitable and benevolent objects hereinafter mentioned rateably, except the Carey Lectureship. 24th. Minutes of the proceedings of every meeting of the said local trustees shall be entered in a book to be kept for that purpose, and signed by the chairman of such meeting, or the following meeting, when they are read over, and shall, when so entered and signed, be conclusive evidence of the business and other matters transacted at such meeting. 25th. The said local trustees and the Faculty of the Londonderry or Belfast Colleges aforesaid may from time to time make such rules and bye-laws for the management and preservation of the said trust property, and the use of the public hall, library, and schools in the said temple, not inconsistent with the main objects of the foundation, as they may think fit, and may revoke, alter, and amend the same, and make and substitute new rules and bye-laws for all or any of the purposes aforesaid at their discretion, but always consistent with the object of the founder. 26th. The said John Carey may, by deed executed by him at any time during his life, rescind, or revoke, or alter all or any of the trusts, covenants, provisions, and clauses in these presents expressed or contained, in any manner that he may think fit, and may substitute other provisions in place thereof: and the said John Carey may remove the said trustees herein named, or any of them, and appoint another or others in his or their stead, and in case of the death of one or more of the said trustees during the lifetime of the said John Carey, he may appoint another or others in his or their place, and may declare and create such further or other trusts in relation to these presents, and the premises mentioned herein, as he may think proper.

The deed of November 15th, 1888, was as follows:—

This indenture, additional to and partly restrictive of another indenture of the 24th of May, 1880, is made this 15th day of November, 1888, between John Carey, of Rarity Cottage, Cloughog, Toome, in the county of Antrim, of the one part, and of the other part William John Mitchell, of Ballyduggan, and Robert Davison, of Ballydonnelly, members of the Session of Elders, and John Wilson, of Ballyduggan, member of the Committee of the Presbyterian Congregation of Duneane, all in the county of Antrim, hereinafter called the local trustees of these presents. Whereas by a deed-poll, bearing date the 24th day of May, 1880, the said John Carey did assign and convey, in trust, to the said William John Mitchell, said Robert Davison, and said John Wilson, of said places, and to their successors, in trust, certain rents, incomes, and annuities issuing out of various lands, tenements, investments, and hereditaments, his property, for the purpose of creating, upholding, and sustaining certain and various objects, religious, moral, social, benevolent, literary, and charitable, therein stated and defined. And whereas the said John Carey has in said deed-poll reserved to himself during his lifetime full and plenary power to alter, revoke, or rescind any or all of the trusts, covenants, provisions, or clauses expressed or contained in said deed-poll in any manner which he thinks proper, and may substitute others in place thereof. Now, acting under this power and privilege, he, the said John Carey, hereby revokes, rescinds, and recalls the appointment number 4, of a male school, and number 7 of a library of books in connection with the Temple of Liberty building, Careyville, Toome, county of Londonderry, as not likely to be of any moral or literary service in that locality, or repay in results the cost of promotion, which is hereby withdrawn from the trusts aforesaid. And further, and still under the said power and reserved privilege of alteration and substitution, the said John Carey arranges and sees right to make and constitute the aggregate funds of the various trusts already stated and enrolled in the deed-poll of the 24th May, 1880, and in this deed-poll, a growing, self-increasing and accumulating estate income until it has reached the annual amount of £1000 sterling. For this purpose, and until this augmentation is completed and the surpluses as they accrue invested in bank shares or other good securities, the said John Carey substitutes hereby and appoints an uniform biennial for and in place of the aforesaid annual distribution of the specific sums of money attached to the different trusts of the said poll-deed of 24th May, 1880, and of any trusts that he may establish, with the exception which is hereby excepted—first, the salary of the teacher of the female school, if found to be a success, conformable with the programme set out in that case; second, the scholarship of the foreign missionary student, if a suitable candidate can be found; third, the bonuses to the towns of Ballymena and Magherafelt for their respective patronising visits to the Temple of Liberty; fourth, the Carey Foundation Lectureship. Provided always, and it is hereby ordered by the said John Carey, that no more shall be paid in any of the alternate years of the distribution to any of the trusts than is set out in the deed-poll of the 24th May, 1880, or in this deed-poll, so that the surplus income of that year, if any, may go to swell the growth of the integral fund to realise the annual income of £1000 per year, to be then divided rateably over all trusts save the Carey Lectureship; and the said John Carey reduces and limits the Foreign Mission to the Heathen from £80 to £70 yearly, number 9, and the bonus to the Hibernian Bible Society from £20 to £10 sterling yearly, number 11, deed-poll, 24th May, 1880. Now this indenture further witnesseth and avers that for the purpose of more fully and effectually sustaining and confirming the several trusts already in the deed-poll of 24th May, 1880, and still retained in this deed-poll, and for such others as may hereby be established, the said John Carey doth hereby and voluntarily grant and convey unto the said William John Mitchell, said Robert Davison, and said John Wilson, and to their successors, in trust, First, all that and those the property and yearly dividends issuing out of 200 shares in the Northern Bank, Belfast, of the present value of £23½ per share; Second, the property and dividends issuing out of sixty-seven shares in the Ulster Bank, Belfast, of the value of £10 per share sterling; and the said trustees and their successors, in trust, are hereby empowered by the said John Carey to sell these shares respectively if they can get higher interest for the money and sure investment, and with the consent of the major trustees of these presents, and of all the said trusts granted by the said John Carey; Third, an annual rentcharge of £35 sterling, issuing by purchase and deed of conveyance out of Milford-street and Alexander-street West, Falls-road, in the city of Belfast, payable quarterly, as a first charge, 1st April, 1st July, 1st October, 1st January; Fourth, the yearly rents of the four dwelling-houses erected on the shore of Lough Neagh, in Creagh, county Londonderry; Fifth, the profit rent to be received for Rarity Cottage, and two gardens under a perpetual lease at £3 yearly, or else the sum of £200 sterling expended on it by the said John Carey; Sixth, the value of the chattels of the said John Carey after his decease; Seventh, all issues, profits and funds issuing out of, connected with, or arising out of, all future property, claims, interests, and investments to be made, realized, and acquired by the said John Carey during the remainder of his natural lifetime without further transfer or conveyance by him to the said trustees and their successors, in trust:

To have and to hold the same for the benefit and support of the said trusts hereinbefore referred to in the deed-poll of 24th May, 1880, and furthermore to the support and maintenance of one other trust. Whereas the great rural population encircling the Temple of Liberty, Careyvale, Toome, are found to be too rude and careless to make any real and improving use of that building, and much require the benefit of the example and cultivation of citizens, it is therefore the desire of the said John Carey, and it is hereby ordered by him, that the said trustees and their successors, in trust, shall select the town of Ballymena, in the county of Antrim, on the one side, and the town of Magherafelt, in the county of Londonderry, on the other side, to patronise the Temple of Liberty as a nursery of knowledge, enlightenment, liberty, and select amusement, this patronage of the towns to be in alternate years—one town this year, the other town the next year, so on, and the service of each town to be three visits each year respectively; on one of these visits to hold a popular musical concert, vocal and instrumental; on another visit to hold a popular soiree; on a third visit a lecture or debate on some popular question, the times of visiting to be four months apart. For these purposes and service the trustees of these presents aforesaid and their successors are hereby ordered by the said John Carey to pay to a charity committee or council of each town aforesaid, in the year of its service, the sum of £50 sterling, to be spent and applied in the purchase and distribution of bed clothing and body clothing to the poor and destitute of each town and its vicinity, the travelling expenses of the visits to the Temple to be paid out of the £50: Provided always that if these towns, or either of them, refuse to act as hereby required, the said trustees and successors are to offer the charitable donation to other towns who will act as above: Provided further that if no town will act as aforesaid, the said trustees may procure with the charity money the similar visits to the Temple of the musical and debating societies always abounding in Belfast. This indenture further witnesseth and provides that the said John Carey reserves to himself during his natural lifetime the full and plenary power and privilege of revoking, rescinding, and altering and substituting, by order, in writing, to the said trustees, all or any of the trust objects or appointments committed to them, set out in the deed-poll of the 24th May, 1880, or in this deed-poll, and of withdrawing from them, or any of them, the donations assigned. This indenture further witnesseth that the said John Carey hereby withdraws and exempts from all trust, incumbrance, and connection, first, and for sale by the said trustees, the whole and entire lot of reclaimed intake lands in Leitrim and Creagh, on the shore of Lough Beg, county Londonderry; second, the Temple of Liberty building and grounds, Creagh, in the said county—the proceeds to be vested in good security, and the interest divided rateably over all the trusts, save and except the Carey Foundation Lectureship.

On December 17th, 1894, a decree was made to carry out the trusts of the deeds and will, and the usual administration accounts and inquiries directed. On May 6th, 1899, the Chief Clerk's certificate was filed. By this it was found (amongst other things) that the heir-at-law of John Carey was Frederick William Carey, not John M'Elvey, and that no transfers of the Northern Bank shares and Ulster Bank shares mentioned in the deed of 1888 had been executed, save the transfers purported to be made by the said deed.

On June 7th, 1899, the action came on for further consideration. The following points as to the effect of the deeds of 1880 and 1888 were discussed:—1. How far, if at all, the deed of 1880 was revoked by the deed of 1888; 2. Whether the trusts substituted by the deed of 1888 were valid, notwithstanding that the deed was not registered, as required by 7 & 8 Vict. c. 97, sect. 16; and, 3. Whether the property in the bank shares passed by the deed, no transfers of them having been executed.

Serjeant Dodd, *Wylie*, *Q.C.*, and *A. F. Todd*, for the plaintiffs.

Cooke, *Q.C.*, and *Osborne*, for the Magee College, Londonderry.

Gordon, *Q.C.*, and *Donaldson*, for the defendant John Ewing.

M'Ilroy, for the heir-at-law.

Morphy, for the Attorney-General.

The arguments of counsel and the authorities cited sufficiently appear from the judgment.

M. R.
1899.

In re CAREY, DECD.
MITCHELL *v.* EWING.

July 27

THE MASTER OF THE ROLLS:—

The first question in this case is, is the deed of 1880 in any material part revoked by that of 1888? The case of *Onions* v. *Tyrer* (1) has been misunderstood. It was cited as an authority for the proposition that when one instrument is in terms revoked by another, and the revoking instrument fails to operate, the former one is not in law revoked, the purpose of the revocation having failed. But this is not the effect of the decision. In the first place it was a case of wills, of course depending not on any consideration founded upon the Wills Act, to which it was long anterior, but under the Statute of Frauds. The testator, by a will duly executed and attested by three witnesses, who subscribed the same in the presence of the testator, devised lands to trustees, to several uses, under which the plaintiff claimed. He afterwards made another will of the same lands, devising them to other trustees, but to the same uses; and there was a clause in the last will revoking all former wills; but in this last will, though subscribed by the testator, and attested by three witnesses, yet the witnesses did not subscribe their names in the presence of the testator. The heir-at-law claimed the lands, and the question was whether the last will, which was admitted to be a void will, *quoad* the lands in question, should yet be a good revocation of the former will? Lord Chancellor Cowper decided that the last will not being perfected so as to make the devise of the lands therein to be good, the devise of the same lands by the former will was unrevoked, though he declared that if the second will had barely revoked the first, without declaring by the same act the intention of the testator to dispose of his lands to the same purchaser, to which they were devised by the former will, the second will would have been a good revocation of the former as to the lands devised. This latter declaration turned on the difference in the wording in the two clauses in the Statute of Frauds as to wills and revocations. When the case is examined it is not really an authority in favour of the proposition for which it was cited.

Tupper v. *Tupper* (2) seems to be very much in point, though also the case of a will. The testator there having made a will directing his executor to appropriate out of his personal estate a certain sum to pay certain charitable legacies, by a codicil revoked these legacies and bequeathed the amount to a fund which was being raised for the purpose of buying land for a charity. Page-Wood, V.-C., held that the revocation remained in force, though the gift by the codicil was void. And so in *Quinn* v. *Butler* (1), where a testator had power by will to charge lands with £7000 to be divided between his children in such shares as he should by will appoint, and in default of appointment between them equally, by his will he charged the lands with the £7000, and directed £4000 of it should be paid to his younger son, and the remaining £3000 to his three daughters equally. By a codicil he revoked the appointment or charge of £7000 made by his will, and charged the said lands with the payment of £7000, to the younger son alone. Lord Romilly held that though the appointment made by the codicil was invalid the revocation nevertheless took effect. Lord Romilly there followed *Tupper* v. *Tupper* (2), and distinguished *Onions* v. *Tyrer* (3). He says, at page 227:—"I think that the whole question depends on the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions* v. *Tyrer* (3) applies. Here there can be no doubt that the intention was to revoke the will altogether." In *Duguid* v. *Fraser* (4) the original gift was held to prevail, a subsequent attempt to appoint having failed; but the facts were very peculiar. A special power of appointment was given to a married lady, the objects of which were her husband and children, and in default of appointment the fund would go, not to that class, but to different persons. She made her will, and appointed the whole fund to her husband and children. That was a gift to a class, so far as the children were concerned, and therefore if any of the children died in her lifetime those living at her death would constitute the class, and the whole fund would be divisible amongst the husband, if alive, and those children. One of her children, her son James, died in her lifetime, and thereupon she made a codicil to her will, and by it she did not in terms revoke the appointment made by the will, or any part of it; but after reciting the fact of the death of the son, she appointed the share which would have gone to him if he had survived her to his two children, who were not objects of the power, and therefore that appointment was invalid. A question was raised between the surviving children and the persons who would be entitled in default of appointment as to who was entitled to the share of the deceased son. Kay, J., held that the original appointment was not affected by the subsequent attempt to make an appointment, which was invalid.

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(1) 1 P. Wms. 343.

(2) 1 K. & J. 665.

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(1) L. R. 6 Eq. 225.

(2) 1 K. & J. 665.

(3) 1 P. Wms. 343.

(4) 31 Ch. D. 449.

These are, no doubt, cases upon wills; but there can be no distinction in principle, and none has been suggested, which would exclude their application to deeds, and both sides have appealed to them. Indeed the case of wills would seem to be more favourable to raise the case of dependent relative revocation than that of deeds: as in the former the law more liberally construes expressions of intention than in the latter.

I am of opinion that so far as the deed of 1888 purports to revoke the trusts of that of 1880 it is operative. That is to say, that the gift of the annual sum of £80, payable to a male teacher under the fourth trust, and the annual sum of £20, to be expended in books under the seventh trust, and the annual sum of £5 payable to the librarian under the eighth trust, and the annual sum of £80 payable to the Foreign Mission under the ninth trust, and the annual sum of £10, portion of the annual sum of £20, payable to the Hibernian Bible Society, under the eleventh trust, have been revoked by the deed of 1888. So also the deed of 1888 is operative so far as it directs a distribution of funds to be made biennially instead of annually.

There can be no doubt of the intention to revoke, so far as the grantor expresses it. He gives his reasons in some cases, which are reasons not in any way connected with any alternative gift, and he expressly "sustains and confirms" the other provisions of the first deed.

But it is said that, even if the revocation be complete, the substituted trusts are valid, notwithstanding that the deed of 1888 was not registered. This question turns on sect. 16 of 7 & 8 Vict. c. 97. The deed of 1880 was duly registered. The section is as follows :—" No donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments for such uses, unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at least before the death of the person executing the same, and unless every such deed or instrument, not being a will, shall be duly registered in the office for registering deeds in the city of Dublin within three calendar months after the execution thereof."

It is suggested that as there is no fresh limitation of estates (strictly so called) in land by the deed of 1888, the section does not apply. It has, however, always been held in this country that a charge upon lands is within the section, where it is dealt with as such. I referred to *Sherlock* v. *Blake* (1), during the argument. No doubt the Vice-Chancellor held in *Stewart* v. *Barton* (2), that a gift of a sum of money " at present invested in mortgage," the will contemplating that before the death of the testator, it might be paid off and invested in other securities, was not within the section. But that case has, obviously, no application at all to the present. Now, having regard to the whole force of this deed and its manifest intention, I think it is clear that the trustees were meant to hold the lands upon trusts, partly identical with and partly different from those of the prior instrument, and that these were, to a large extent, trusts of land, or of the produce of land, and not mere sums of money belonging to the settlor, and happening to be, for the time being, secured upon land. It is, therefore, clear that *prima facie* the trusts of the deed, so far as they affected lands, were within the section.

But it was contended, the deed of 1880 was registered, and the deed of 1888, being supplementary to it, did not need registration, as it might have done standing alone. For this proposition, reliance was placed upon *Attorney-General* v. *Glyn* (3), and similar cases. In *Attorney-General* v. *Glyn* (3), the Vice-Chancellor says, at p. 87 :—" With respect to the question, whether the lease is void, because it was not enrolled within six calendar months after the execution thereof, which is an objection

(1) 10 Ir. Jur. (N. S.) 350. (2) I. R. 6 Eq. 215. (3) 12 Sim. 84.

that arises on the statute of 9 Geo. 2, my opinion is that I ought not to send any case to a Court of law on the point, because the precise point was determined in *Walker* v. *Richardson* (1); and I must say that it is my own opinion that the question was rightly decided in that case. It is plain that what was meant by the statute, was to repress the testamentary disposition of land to charitable purposes, and also to enforce the statutes of mortmain. But if the land be already in mortmain, it is altogether out of the considerations of the Legislature."

This case was decided on the authority of *Walker* v. *Richardson* (1); and it will be seen in the latter case that the *ratio decidendi* was that the section of the Mortmain Act did not and could not apply to alienations of land already in mortmain, that is, to alienations by the owners in mortmain. If the analogy between the two statutes applied, an alienation, to come within *Walker* v. *Richardson* (1) would be an alienation by the trustees of the deed of 1880, and not a declaration of new uses by Carey, who was not owner in mortmain at all. This is no formal distinction. I quote from Parke, B., at p. 892:—"This is equally a body corporate, and not within the letter of the Act; neither is it at all within the spirit, not being a grant by a private individual. If it had been a grant by other persons to trustees upon these trusts, I should have been inclined to think the lease was void, as most of the purposes to which the trust fund is to be applied, are charitable trusts of a public nature, though it may be doubtful whether payment of the debts of the corporation can be so considered."

Ashton v. *Jones* (2), is a decision on the same point.

The deed of 1888 revoked the old uses *pro tanto*, and declared new ones. That in my mind was, first, a complete destruction of the uses in question, leaving the lands free from them: and, second, a new use, separate and independent of the old, just as much as if the revocation had been contained in one deed (in which case the lands would have reverted to Carey), and the declaration of new uses in another, which would have been a fresh transaction. The form in which it is done is nothing. The substance is the same; and the upshot is that the want of registration is fatal, so far as the deed affects to create new charitable interests in the lands. The policy of the Irish enactment (7 & 8 Vict. c. 97) appears to be the same as that declared in the English Act, 9 Geo. 2, c. 36; and that policy is just as much concerned with transactions depending on a fresh limitation of uses, creating new charitable interests in lands, as in cases in which the object is carried out by common law assurances or devises.

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(1) 2 M. & W. 882.

(2) 28 Beav. 460.

The third point is, as to the effect of the clause in the deed of 1888 dealing with certain bank shares. It is as follows:—"Now this indenture further witnesseth and avers, that for the purpose of more fully and effectually sustaining and confirming the several trusts already in the deed-poll of 24th May, 1880, and still retained in this deed-poll, and for such others as may be hereby established, the said John Carey doth hereby and voluntarily grant and convey unto the said William John Mitchell, and Robert Davison, and John Wilson, and to their successors in trust, First, all that and those the property and yearly dividends, issuing out of 200 shares in the Northern Bank, Belfast, of the present value of £23½ per share, Second, the property and dividends issuing out of 67 shares in the Ulster Bank, Belfast, of the value of £10 per share sterling, and the said trustees and their successors are empowered by the said John Carey to sell these shares respectively, if they can get higher interest for the money and sure investment." The *habendum* is "to hold the same for the benefit and support of the said trusts hereinbefore referred in the deed-poll of 24th May, 1880, and to the support of one other trust" with reference to the "Temple of Liberty," which he then specifies.

That Mr. Carey meant to transfer the shares is, of course, clear; but he did not adopt the mode of transfer, admitted to be the only effectual legal one, provided by the articles of association of the banks in question, and the intended transfers have not been accepted, acted on, or registered. The next-of-kin of the settlor say the transaction is wholly void, that is, although it might be good in equity, yet, as equity does not assist a charity, and the shares cannot be got at without the help of the Court, they cannot be reached by the charities which claim them.

There are cases in which charities stand on a different footing from ordinary donees or legatees. It is a well-known rule, of course, that equity will aid the defective execution of a power in favour of a charity.

In *Innes* v. *Sayer* (1) Wigram, V.-C., says, at p. 388:—"The principle upon which the Court appears to go is this, that, if a person has power by his own act to give property, and has by some paper or instrument clearly shown that he intended to give it, although that paper, by reason of some informality, is ineffectual for the purpose, yet the party having the power of doing it by an effectual instrument, and having shown his intention to do it, the Court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done. It is not for me to give any opinion, whether the principle be right or not. There appears to be very high authority for the application of the principle, independently of the statute of Elizabeth; and it has been applied since the statute. I think, therefore, I ought not to entertain any question upon the point. If the point is to be hereafter considered and treated differently, it ought to be ruled by a higher authority than the Judge who presides in this Court." In the same case on appeal (2) Lord Truro says, at p. 620:—"It ought to be considered as established by judicial decision, that a power well exercised in all other respects will, in favour of charities, be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power."

In *Attorney-General* v. *Rye* (3), the very strong step was taken of confirming a testamentary disposition in favour of a charity by a tenant in tail who had not levied a fine or suffered a recovery as against the heir in tail. This was done by the Lord Keeper, expressly on the ground that the object of the statute 43 Elizabeth, c. 4, "was to make the disposition of the party as free and easy as his mind." And in *Attorney-General* v. *Burdet* (4), in the same volume, p. 755, it was decided that an appointment by a tenant in tail to a charity shall bind the reversioner in fee, the statute supplying all defects of assurance, when the donor is of capacity to dispose, and with such an estate as is in any way disposable by him, whether by fine or common recovery.

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(1) 7 Hare, 377.

(2) 3 Mac & G. 606.

(3) 2 Vern. 453.

(4) 2 Vern. 755.

The inference from these cases is that equity will, in favour of a charity, help a defective execution of a power, just as in the case of children, and the like, and that by virtue of the statute 43 Elizabeth it will supply defects which are more than formal.

The present case, however, does not fall within the former class of cases. It is not a question of aiding the defective execution of a power. That is a head of equity well understood and recognized, and I have no intention of trenching upon it. In some well known ways, of which that is one, charities are favoured by law. In others, such as marshalling assets, charities stand in a less favoured position. The question turns rather on the analogy of the latter class of cases, and in considering whether the present one falls within the principle, I must consider whether it applies in Ireland, as I must assume it does in England.

Whether the cases in Vernon would now be followed in England, I, of course, do not presume to say. It may be a nice question if it arises. The statute of Elizabeth on which *Attorney-General* v. *Rye* (1) and *Attorney-General* v. *Burdet* (2), were decided is not an Irish statute. The Irish Acts at all analogous to it are 10 Car. 1, sess. 3, c. 1, and 3 Geo. 3, c. 18; at least I am acquainted with no others. If we compare these enactments, it will be seen that they have not much in common. Assuming that the English Act of Elizabeth affords a groundwork for the decisions based upon it (and it is hard to discover how this is), the Irish Statutes seem to afford none such. The Act of Charles refers exclusively to pious uses. The Act of George 3 relates altogether to the discovery of charitable donations and bequests. Had there been no statutes in force in England, but statutes similar to these, I think it impossible that *Attorney-General* v. *Rye* (1) and *Attorney-General* v. *Burdet* (2) could have been decided as they were. These decisions were based upon an assumed policy of the Legislature, for which no warrant is to be formed in our Legislative enactments.

It is thus clear that there is a vital distinction between the statutes, and that no argument founded on the policy of 43 Elizabeth can apply in this country, to do what was done, under a supposed intention to be gathered from that Act. The *ratio decidendi* therefore of such cases as *Attorney-General* v. *Burdet* (1) is wanting here.

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(1) 2 Vern. 453.

(2) 2 Vern. 755.

I do not regard it as within my province as a Judge of first instance to create in this part of the United Kingdom a new head of equity. In my opinion, as regards grants and assignments and so far as the present question is concerned, the law as to charities is not different from that applicable to other objects, except in the case of defective execution of powers, and I must hold that the shares in question were not sufficiently transferred by the deed of 1888.

The fourth point was, that even if the deed of 1880 was in part revoked by that of 1888, and even if the charitable uses under the latter deed have failed, yet as to the property there is a general charitable trust manifested which ought to be carried out by a scheme. I fail to follow this contention. If the uses of 1880 are in part revoked, there is under the deed of that date no charitable trust left. The grantor might have devoted the property to any use he chose. He tried to do it in a way which has failed, and the lands and property are not dedicated to any charitable trust whatever.

The deed of 1880 stands, so far as it is not revoked by the deed of 1888. So far as it is revoked, the property is subject to no charitable use, and must devolve, there being no devise in the will capable of capturing it, upon the real and personal representatives respectively, that is upon the heir-at-law and next-of-kin.

Dec. 19.

On this day the case came before the Court to settle the minutes of the decree of July 27th.

Donaldson, for the defendant John Ewing :—

There is a further point arising on the deed of 1888, which was not decided by the judgment of July 27th, namely, as to the future acquired property purported to be seventhly conveyed by

(1) 2 Vern. 755.

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v.
EWING.

that deed. This amounts to a considerable sum, and it is submitted that it did not pass by the deed, but is the property of the personal representative. The conveyance of non-existing property only amounts to a contract to convey it when it comes into existence, and equity will only enforce such a contract when it has been made for value. Here the deed was voluntary. He referred to *Holroyd* v. *Marshall* (1); *Collyer* v. *Isaacs* (2); *In re Anstis, Chetwynd* v. *Morgan* (3).

Cooke, Q.C. (*Osborne* with him), for the Magee College, Londonderry.

The decision of the Court as to the bank shares rules this point. It was argued on the former occasion, but unsuccessfully, that the principle of not assisting a volunteer did not apply to a charity, and *Innes* v. *Sayer* (4) was relied on.

The same counsel appeared for the other parties.

THE MASTER OF THE ROLLS :—

Mr. Donaldson has now raised a question, which he says was not referred to by me in my judgment, but which he mentioned afterwards, namely, as to the effect of the deed of November 15th, 1888, executed by John Carey, as regards the property purported to be seventhly conveyed thereby, namely, "the issues, profits, and funds issuing out of and connected with or arising out of all future property, claims, interests, and investments, to be made, realized, and acquired by the said John Carey during the remainder of his natural lifetime, without further transfer or conveyance by him to the said trustees and their successors." Mr. Donaldson says that the property acquired by John Carey since the date of the deed is considerable, and contends that such property did not pass by the deed, being a voluntary one; it can only operate as a covenant to assign, and is not now operative. He cited *Holroyd* v. *Marshall* (1) and *Collyer* v. *Isaacs* (2), as showing that it is only in the case of a contract for value to assign future property that equity will interfere to enforce the contract, and not in the case of a volunteer.

(1) 10 H. L. Cas. 191.
(2) 19 Ch. Div. 351.
(3) 31 Ch. D. 596.
(4) 7 Hare, 377.

No doubt the principle laid down in those cases is that equity will not assist a volunteer, but the question here is not exactly the case of an ordinary volunteer claiming the benefit of an imperfectly executed deed, but that of a charity. It was argued by Mr. Cooke that though in the case of an ordinary volunteer it would be an imperfect gift, yet in the case of charities the English authorities showed that defective instruments had been aided by the Court. There is a large class of cases where equity will aid the defective execution of a power, and if this had been such a case it would be different. It is, however, the case of a conveyance simply. It was pressed upon me in argument at the original hearing that this doctrine applied to the case of the bank shares, which had not been transferred in the only legal way, namely, by registered deed of transfer, but merely by the deed of 1888, which purported to transfer them, and that the intention to dispose of the shares as expressed by that deed would be good in the case of a charity. Amongst the English authorities referred to was that of a tenant in tail, who had not levied a fine or suffered a recovery, disposing by will of lands to a charity, which was held good against the heir in tail (1). That was an extreme case. I held that the principle of those cases did not apply in this country to the transfer of the bank shares. I showed that the principle on which the English cases were decided was that something was to be found in the English Act indicating a policy of the Legislature which the Court was bound to follow, but that the Irish statutes had no resemblance in this respect to the English, and I came to the conclusion that the principle did not apply to the bank shares. If I was right in that I cannot apply it to the future acquired property, and I must hold that it did not pass under the deed of 1888.

Solicitor for the plaintiffs: *John K. Currie.*
Solicitor for the defendant John Ewing: *R. Boal.*
Solicitor for the heir-at-law: *F. Kerr.*
Solicitor for the Magee College: *J. K. Reid.*
Solicitor for the Attorney-General: *Warren.*

W. L.

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(1) *Attorney-General* v. *Rye*, 2 Vern. 453.

In the MATTER of the ESTATE of THOMAS CONOLLY, RIGHT HON. HENRY BRUEN, HENRY G. COOPER, and SARAH ELIZA CONOLLY, Owners; THE SCOTTISH PROVIDENT INSTITUTION, Petitioners.

Ross, J.
1900.
April 23.

Solicitor—Bill of costs—Costs of deed of release of land from rentcharges on payment off—Purchase on sale.

The lands of A and B were originally charged with certain rentcharges. By a settlement executed in 1868 the lands of C were charged with these rentcharges in indemnification of A and B. An action was brought to administer the real and personal estate of the owner of C, and in pursuance of the order of the Master of the Rolls a petition for the sale of C was presented. An arrangement having been come to with the owners of the rentcharges for their redemption out of the proceeds of the sale of C, the Master of the Rolls approved of it, subject to title being shown to them; and that title was subsequently approved of.

The Land Judge directed that the lands of C should be sold discharged from the rentcharges; that the owners of the rentcharges should be put on the Final Schedule of Incumbrances for the amount of the redemption price; and that they should execute a deed of release of A and B from the rentcharges at the expense of C. This deed was stamped as a conveyance:—

Held, on appeal from the Taxing Master, that the deed was a conveyance; and that the costs should be taxed under Schedule 1, Part 1, to the General Orders, under the Solicitors' Remuneration Act, and not under Schedule 2.

Appeal by the solicitors having carriage, from an order of the Taxing Master (Master Coffey) dated the 15th March, 1900. The appellants claimed that they might be declared entitled to the sum of £78 10*s.* 6*d.* claimed for professional charges at item 3296 in the bill of costs lodged in this matter in lieu of £35 allowed by the Taxing Master in respect thereof.

Item No. 3296 in the bill of costs was as follows:—

"Solicitor's fee on conveyance deed of annuities (late Irish currency) of £250, and £9, for £6800, £78 10*s.* 6*d.*"

The facts of the case were as follows:—

Under the will of the Right Honorable William Conolly, dated the 18th October, 1729, certain lands at Rathfarnham, in the county of Dublin were charged with a perpetual rentcharge of £250 late Irish currency. By an indenture dated the 10th June, 1780, and made between the Right Honorable Thomas Conolly of the first part, Joseph Henry of the second part, and Thomas Marlay of the third part, certain lands known as Leixlip, in the county of Kildare, were charged with a perpetual rentcharge of £9 late Irish currency. For many years prior to the year 1868 the estates of the Conolly family situate at Castletown, in the county of Kildare, paid the rentcharge of £250 in indemnification of the Rathfarnham estates. By the settlement dated the 28th August, 1868, executed on the marriage of the late Mr. Thomas Conolly with Sarah Eliza Shaw, the Donegal estates (which were comprised in the petition for sale herein, and a large portion of which have been sold) were charged with the rentcharges of £250 and £9 in indemnification of the other estates originally liable thereto. None of the lands originally liable to these rentcharges were included in the petition for sale. The Donegal estates, of which the late Mr. Thomas Conolly was owner in fee, were only comprised in the settlement for the purpose of charging them with these annuities.

The Scottish Provident Institution had instituted proceedings in the Court of the Master of the Rolls to have the real and personal estate of the late Mr. Thomas Conolly administered; and the petition for sale in this matter was presented in pursuance of the judgment of the Master of the Rolls, dated the 15th May, 1889. During the progress of the proceedings for the sale in this Court an arrangement was come to with the Incorporated Society for promoting Protestant Schools in Ireland (who were then the owners of the rentcharges) for the redemption of the rentcharges for £6800. The matter came before the Master of the Rolls on the 19th January, 1897, who ordered that the offer of the Incorporated Society to accept this sum be approved of, subject to title being shown to the rentcharges, the sum of £6800 to be paid out of the proceeds of the sale of the Donegal estates of the late Mr. Thomas Conolly.

The title of the Incorporated Society was submitted to counsel and approved of by him, subject to searches subsequently made. An application was afterwards made to the Land Judge, grounded on the approval of the Incorporated Society's title, and claiming that the £6800 be returned on the final schedule of incumbrances. On that occasion the owner appeared by counsel, and insisted that a proper deed of release should be executed. The Land Judge ordered that the lands be sold freed and discharged from the perpetual rentcharges, and that the sum of £6800, being the redemption price of the said charges, be paid to the Incorporated Society out of the proceeds of sale of the Donegal estates, and that the Society be returned on the final schedule of incumbrances for the sum of £6800; and further ordered "that upon payment of the said sum of £6800 in manner aforesaid the said Society shall execute a proper deed of release of the estates liable to the said rentcharges from the same, and every part thereof, such release to be prepared by the solicitor having carriage of the sale, at the expense of the estates ordered to be sold in this matter, and to be approved of, free of expense to the estate, by the solicitor for the owner, Thomas Conolly, and the other parties entitled to the Kildare settled estates."

A large part of the estate was sold on the 2nd of July, 1897, and on the 28th of July, 1897, £6800 was paid to the Incorporated Society. The solicitors having carriage prepared a draft deed of conveyance by way of release of these rentcharges, which was approved of by the solicitors for the Incorporated Society, and subsequently executed. This deed was stamped as a conveyance with a stamp of £34 10*s*., and not as a mere release.

After argument before the Taxing Master, he held that the scale fee provided by the Solicitors' Remuneration Act did not apply, and he allowed the sum of £35 in connection with this work, besides the expenditure, and thus deducted the sum of £43 10*s*. from item 3296.

T. P. Law, Q.C., for the applicants:—

The sale of the rentcharges was outside the Court. The Court had no power to compel the redemption. Even if it could be held that the business was connected either with the suit or the matter, the scale fee would equally apply: *Stanford* v. *Roberts* (1). The Master of the Rolls directed title to be shown, and the Land Judge directed the deed to be prepared. All the work required by the General Orders made in pursuance of the Act was done.

This was, in fact, a purchase by Thomas Conolly, the owner of the Kildare and Rathfarnham estates, of these rentcharges, the price or purchase-money being, however, provided by the Donegal estates, which were liable thereto under the settlement of 1868.

Ross, J., held that it was a purchase on sale, and made the following order:—"The Court doth declare the said applicants entitled to the said amount of £78 10*s.* 6*d.*, costs claimed by them at item 3296 in said bill of costs, and that the Taxing Master be at liberty to amend his ruling (reducing said amount to a sum of £35) accordingly. No costs."

Solicitors having carriage: *Reeves & Sons.*
Solicitor for the owner: *H. G. Cooper.*

W. C. S.

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(1) Reported cases on Costs, 248.

M'KAY *v.* M'KAY.

M. R.
1899.
Nov. 9, 21.

Appeal.
1900.
April 24.

(1899. No. 714.)

Will—Construction—Substitutional gift—Revocation by codicil—Gift by implication.

By his will, dated the 19th October, 1867, M. devised the lands of N. to trustees, upon trust to the use of his son D. M. and his heirs upon his attaining the age of twenty-six years, and in the meantime, and until his said son should attain that age, to apply the rents and profits for his maintenance. The will also contained a power of advancement. The will then provided that in case D. M. should die before he attained twenty-six, then from and immediately after his death to the use of the testator's eldest son W. M., and the testator appointed his daughter residuary legatee and devisee.

By a codicil dated the 15th July, 1868, the testator revoked all the gifts in his will to D. M., and in lieu thereof gave him a rentcharge charged upon all the testator's real estate in the county of D., and the testator declared the same to be in full substitution of all absolute and reversionary interests to which his said son or his heirs would or might have been entitled under his said will, which the testator thereby confirmed in all respects, save in so far, and as to such parts thereof, as were thereby revoked.

The testator died on the 8th February, 1899. At the date of the codicil D. M. was under twenty-six, but he had attained that age at the date of the death of the testator:—

Held, by the Court of Appeal (reversing the decision of the Master of the Rolls), that W. M. did not take any interest in the lands of N., but that the same passed under the residuary clause in the will.

Special Case.

At the date of his will, William M'Kay was seized in fee-simple of the lands of Grove Hall, Newtown Grove, and Ray, situate in the county of Donegal.

The said William M'Kay made his will, dated the 19th day of October, 1867, and thereby devised the said lands (with others) unto John H. Orpen and the Reverend Henry N. Rynd, and their heirs, to the uses and upon the trusts declared concerning the same, that was to say—as to and concerning the said lands of Grove Hall, Newtown Grove, and Ray, upon trust, to the use of his son Daniel M'Kay and his heirs, upon his attaining the age of twenty-six years, and in the meantime, and until his said son should attain that age, to the use and intent that the said trustees should, with the consent of the persons therein mentioned, apply the rents, issues, and profits of the said lands for the maintenance or otherwise for the use and benefit of his said son, and in case his said son should die before he attained that age, then from and immediately after his decease to the use of the testator's eldest son William M'Kay (the plaintiff) and his heirs. The will contained a power to the trustees to raise by way of advancement a sum not exceeding £600 for the benefit of Daniel M'Kay out of his presumptive or contingent share, and the testator directed that any deed or mortgage executed for the purpose of raising the money should be a valid and subsisting charge, notwithstanding the death of Daniel M'Kay before he attained the age of twenty-six. The will contained the following residuary disposition, namely, "I give, devise, and bequeath all the rest, residue, aud remainder of my property of whatever kind the same may be whether real or personal to my daughter, Frances Anna (the defendant), hereby appointing her my residuary legatee."

By a codicil dated the 15th July, 1868, the testator revoked all and every the gifts, devises, and bequests to his said son Daniel, contained in his will, and in lieu thereof he gave to him an annuity of £65 charged upon all the testator's real estate in the county of Donegal, provided that the said rentcharge should cease if his said son should alienate or anticipate the same; and the testator declared the same to be in full substitution of all absolute and reversionary interests to which his said son or his heirs would or might have been entitled under his said will, which the testator thereby ratified and confirmed in all respects, save in so far, and as to such parts thereof, as were thereby revoked.

The testator died on the 8th of February, 1899, and probate of the said will and codicil was granted to the plaintiff and defendant, on the 1st of May, 1899.

The said Daniel M'Kay was still under the age of twenty-six years at the date of the said codicil, but had attained such age prior to the death of the testator.

The rental of the said lands of Grove Hall, Newtown Grove, and Ray was about £137 per annum.

The questions submitted for the opinion of the Court were: 1, Whether upon the true construction of the will and codicil of the testator, and in the events which have happened, the plaintiff became, on the death of the testator entitled to the lands of Grove Hall, and Newtown Grove, and Ray? or 2, Whether the defendant became entitled thereto under the residuary devise contained in the will?

Brady, for the plaintiff William M'Kay:—

The estate is given to Daniel, if he attains twenty-six. The codicil revokes this gift. But clearly, on the construction of the will, the intention of the testator was that William is to have the estate in case Daniel does not. There is no rule of law preventing this intention being carried out. There is an estate given to William, subject to the interest previously limited. The testator gives it to William, provided Daniel does not take. Once the first limitation is out of the way, the latter gift, which is an independent limitation, takes effect. There is a conditional limitation and not a strict condition: *Avelyn* v. *Ward* (1); *Davies* v. *Davies* (2); *Eavestaff* v. *Austin* (3); *Mackinnon* v. *Sewell* (4); *Maddison* v. *Chapman* (5).

A particular passage in a will, disappointing the obvious intention of a testator, will not receive a literal interpretation: *Pearsall* v. *Simpson* (6).

George Green, for the defendant Frances Anna M'Kay:—

There is no intention to be gathered from the wording of the will that the estate is to go to William if Daniel does not take; and the cases cited do not apply. It is not merely the gift to Daniel which is revoked by the codicil, but the limitation over in favour of William, which was only to take effect on a certain event which has not happened. Daniel, having attained twenty-six, would be entitled but for the codicil. William only takes if Daniel dies before attaining twenty-six. There is a strict

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(1) 1 Ves. Sen. 420.
(2) 47 L. T. (N. S.) 40.
(3) 19 Beav. 591.
(4) 2 Myl. & K. 202.
(5) 4 K. & J. 709.
(6) 15 Ves. 29.

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Nov. 21.

condition, and the event, upon which the gift over is made contingent, has not taken place. There is an absolute revocation of both gifts. *Boulcott* v. *Boulcott* (1), really decides this case: *Williams* v. *Chitty* (2); *Doo* v. *Brabant* (3).

THE MASTER OF THE ROLLS:—

I am not sure that it is necessary to decide whether under the will, Daniel took an immediate estate in fee subject to divesting or whether he took no estate except in the event of his attaining the age of twenty-six. It was assumed that the latter view is correct, and that such cases as *Fox* v. *Fox* (4) do not apply, and on that basis the case was argued. In the view I take of it, it does not appear to me necessary to decide this point, and I do not do so.

The revocation by the codicil is express and complete, so far as Daniel is concerned. Daniel attained the age of twenty-six years in his father's lifetime, and is still living.

The short question in the case is whether the plaintiff took any estate in the lands in question which were devised to him "in case" Daniel "should depart this life before he attains the said age" (twenty-six), an event which did not happen. When he made his will there can be no doubt that testator supposed he had provided for the events likely to occur. If Daniel attained twenty-six he became owner in fee. If he did not, William did. The residuary clause would be a further protection against lapse or intestacy. But it is more than probable that the testator did not contemplate that the plaintiff might die before him: if he did not, every event is provided for; and in fact he did not. It is to be observed then that the destruction of the one estate is to be brought about by the very event by which the other estate is brought into being. There is no added condition attached to the latter. The selfsame occurrence determines the one or prevents it from arising, and indefeasibly vests the other.

The codicil, while it revokes the estate of Daniel, and substitutes for it an annuity charged upon the same lands, does not purport to affect the devise to William, but in terms ratifies and confirms the will in all respects (save as to Daniel).

(1) 2 Drew. 25.

(2) 3 Ves. 545.

(3) 3 Bro. Ch. Cas. 393.

(4) L. R. 19 Eq. 286.

The effect of this partial revocation, according to the contention of the defendant, was to create an intestacy as to the lands, Daniel having attained twenty-six; because Daniel's estate was revoked, and on the literal reading of the clause in the will the condition on which William was to take did not happen. I am quite sure that when confirming his will in all other respects, the testator did not mean this. Still, the literal construction of the language he has used is an argument worthy of consideration, whatever we may be sure he meant to do.

There are many cases in which, particularly in reference to successive limitations, the Courts have held that though the exact event on which the later is made apparently to depend may not have happened, yet if the meaning be discernible and is seen to be "subject to the foregoing estates" or the like, the substance must be regarded and not the mere letter. This is never done where to the later gift is attached any further condition than that upon which the former determines; because in such a case it obviously could not be said that the latter gift was meant to be equivalent to "subject to the foregoing."

Thus, in *Avelyn* v. *Ward* (1), Lord Hardwicke says:—"I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place."

In *Maddison* v. *Chapman* (2) Sir Page-Wood says:—"I apprehend, the true way of testing limitations of that nature is this: Can the words which in form import contingency, be read as equivalent to 'subject to the interests previously limited?' Take the simplest case:—A limitation to A for life; remainder to B for life, and, upon the decease of B, 'if A be dead,' then to C in fee. There the limitation to C is apparently made contingent upon the event of A's dying in the lifetime of B. Nevertheless, inasmuch as the condition of A's death is an event essential to the determination of the interest previously limited to him, the Court reads the devise as if it were to A for life; remainder to B for life;

(1) 1 Ves. Sen. 420.

(2) 4 K. & J. 709, at p. 719.

and on B's death, subject to A's life interest (if any), to C in fee. That is an intelligible principle of construction; but, in order to its application, the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A for life; remainder to B for life; 'and if at the death of B, A shall have died under the age of twenty-one'; or 'and if at the death of B, A shall have died without leaving children, then to C in fee,' here, in either case, room is left for contingency. The condition of A's dying, in the first case, under twenty-one, and, in the second, without leaving children, is an event which may or may not have happened when the life estates in A and B are determined; and, until it has happened, the limitation over is contingent, not merely in appearance, but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply." This case was affirmed on appeal in 3 D. G. & J. 536, and quoted by Lord Hatherley himself in *Edgeworth* v. *Edgeworth* (1). Many other cases might be cited to the same effect: such as *Pearsall* v. *Simpson* (2); *Chellew* v. *Martin* (3); and *Key* v. *Key* (4).

It is true they are mostly cases of successive limitations, since it is in these that the question most usually and naturally arises. But I see no substantial distinction between cases of successive limitations and cases such as the present, where estates, not limited by way of remainder, take effect by way of executory devises. The point is not what estates are or may be conferred; but, what is the meaning of the language used in conferring them? Here, the testator says, "if Daniel attains twenty-six the estate is to become his: if he does not, it is to be William's." That is, I think, the same thing as saying, if it does not become Daniel's, it is to be William's.

Mr. Green mainly relied on *Boulcott* v. *Boulcott* (5); but I do not think that the point decided necessarily rules that which is here involved.

In *Boulcott* v. *Boulcott* (5), by a codicil a testator revoked certain devises made by his will in favour of his nephew Joseph, and the point material to the present case arose in connection with Joseph's share. The Vice-Chancellor says (p. 34), "As to Joseph's share the case is not quite so clear. To Joseph there is a gift of one-eighth absolutely, subject to this, that if he dies in the testator's lifetime, leaving a child or children, they are to take. But then it is provided that if he dies without leaving child or children, the event which has happened, then the share which he would have taken is to go to the survivors or others; so that if there had been no revocation, Joseph, in the events which have happened, having died without issue, his one-eighth would have gone over to the other seven. But then comes the revocation. The question suggested is, whether the gifts over are to be dealt with with reference to the revocation only, or with reference to Joseph having died without leaving children. But as Joseph was living when the testator revoked the gift, the testator must have have had in his contemplation that he had given to Joseph a one-eighth share, with limitations over in one event to his children; in another to the other nephews and nieces. He means, I think, nothing of this to take effect. He revokes it altogether, not merely as to Joseph's individual interest, but as to the limitations of his share, which were to take effect in certain events. I am of opinion that the revocation is absolute as to the whole of that share, and that it goes to the heir-at-law and next-of-kin." There is a distinction between that case and the present. The Vice-Chancellor there was able to come to the conclusion, on a discussion of all the documents, as a matter of fact, that it was the intention of the testator to revoke the whole of the limitations as regards the share given to Joseph absolutely. He admits in his judgment that the point is not quite clear; and it does not appear to have been very fully argued. On the whole I do not think it is an authority which coercively rules the present case. But even if *Boulcott* v. *Boulcott* (1) were correctly decided on its own facts, it cannot impair the great authority of *Maddison* v. *Chapman* (2) (decided afterwards), and I must follow the principles laid down in the latter case. *Maddison* v. *Chapman* (2) is not an authority merely

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(1) L. R. 4 H. L. 35.
(2) 15 Ves. 29.
(3) 21 W. R. 671.
(4) 4 D. M. & G. 73.
(5) 2 Drew. 25.

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(1) 2 Drew. 25.

(2) 4 K. & J. 709.

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for the construction of words used in the will, but for the principle and canon of construction applicable to all similar wills: designed to further and not to defeat the intention. I am clearly of opinion that the present case comes within the principle of *Maddison* v. *Chapman* (1), and that the plaintiff is entitled to succeed.

R. W. L.

Appeal.
1900.
April 24.

The defendant appealed (2).

Serjeant Campion, Q.C., and *George Green*, for the appellant.

O'Connor, Q.C., and *C. R. Brady*, for the respondent.

The following cases were cited in addition to those referred to in the Court below: *Humberstone* v. *Stanton* (3); *Jones* v. *Westcomb* (4); *Statham* v. *Bell* (5); *Meadows* v. *Parry* (6); *Edgeworth* v. *Edgeworth* (7).

Lord Ashbourne, C.:—

We have had ample opportunity of considering this case during the full argument we have heard, and we have received every assistance from counsel. It is a case arising on the construction of a will, which, I think, is not complicated or obscure, and, in my opinion, the testator has expressed himself with reasonable precision. He was possessed of the lands of Grove Hall, Newtown Grove, and Ray, which he devised to trustees upon trust for his son Daniel M'Kay and his heirs, upon his attaining the age of twenty-six years, and, in the meantime, until he should attain that age, the rents were to be applied for his maintenance, and then the testator proceeds:—"In case he should die before he attains the said age then from and immediately after his decease, to the use of my eldest son William M'Kay and his heirs." There is a residuary clause in favour of the testator's daughter, who is the defendant in this case. The facts of the case disclose that Daniel attained the age of twenty-

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(1) 4 K. & J. 709.

(2) In the Court of Appeal, before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

(3) 1 Ves. & B. 385.

(4) 1 Eq. Cas. Ab. 245.

(5) Cowp. Rep. 40.

(6) 1 Ves. & B. 124.

(7) L. R. 4 H. L. 40.

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Ashbourne, C.

six, prior to the death of the testator, and, therefore, if there was nothing more in the case, on the death of the testator, William would have got nothing. But the testator added a codicil to which extraordinary effect is sought to be given. By that codicil the testator revoked the devise to Daniel, and in lieu thereof he gave Daniel a rentcharge of £65 per annum, charged on his real estate, and he declared that this rentcharge was to be "in full and entire substitution of all absolute and reversionary interests to which my said son or his heirs would or might have been entitled under my said will, which I hereby ratify and confirm in all respects, save in so far and as to such parts thereof as are hereby revoked." It is contended that though, under the will, William would get nothing, still, in consequence of the revocation by the codicil of the devise of the lands to Daniel, William is to get the lands. What is revoked? and what is left? What is revoked is a contingent estate given to Daniel, contingent on his attaining the age of twenty-six. What is left? At best, assuming that anything is left of what was given to William, it would be only a contingent estate to William, depending on an event which had not happened. In construing the will we must begin with the words:—"In case he shall die before he attains the said age, then from and immediately after his decease to the use of William." How does that give anything to William, if Daniel attained twenty-six? The gift to William was contingent on an event which has not happened, and which can never happen now.

It was then contended by Mr. O'Connor that the last words in the codicil supported his argument, by which the testator ratified and confirmed his will in all respects, save in so far and as to such parts thereof, as were thereby revoked. What does he confirm? Again, we must begin with the words: "In case he shall die before he attains the said age," which utterly destroy the estate of William, because the event on which he was to take did not happen.

There were a number of authorities cited, as is usual in a will case, but I shall refer only to one or two. It was contended that the words preceding the gift to William are not words of contingency, but that we ought to read all the words introductory to that devise as equivalent to "subject as aforesaid," or "subject to the estate given to Daniel." If we could read in words that are not in the will, or strike out words that are in the will, we should be within *Maddison* v. *Chapman* (1). But here the testator deliberately used words of contingency, when describing the estate that William was to get. I think the nearest case to the present is *Boulcott* v. *Boulcott* (2).

In my judgment, William only got a contingent estate in an event which did not happen, and I am, therefore, of opinion that the appeal should be allowed.

FITZ GIBBON, L.J.:—

We have to determine the effect on a will of a codicil which partly revokes and partly confirms it. We must first see what the will gave. In my opinion, the primary purpose of the will was to give the property now in question to Daniel, and although William was to take Daniel's lands in the only specified event of Daniel's not living to take them at the age of twenty-six years, the gift to Daniel was the first consideration of the testator, and William's estate was contingent upon Daniel's being defeated by death under twenty-six, which contingency has not happened. It was a disposition of the whole estate for the benefit of Daniel, who took the whole thing subject to defeasance by his death under twenty-six, and that was the only event in which William was to take anything under the will.

From the terms of the codicil, it is plain that the testator had present to his mind the difference between contingent or defeasible future interests, which he called "reversionary," and "absolute" or immediate interests. The will contains an immediate and absolute gift of certain rent and arrears to Daniel. It also contains a provision for raising £600 for the advancement of Daniel before attaining twenty-six, which might or might not take effect, and any mortgage executed under that provision was to remain an absolute charge upon the lands, notwithstanding Daniel's death under twenty-six. The codicil revokes "all and every the gifts, devises, and bequests" to Daniel. The rentcharge of £65, which it gives, becomes payable on the first quarterly day after the testator's death, and it is "to be in full and entire substitution of all absolute and reversionary interests to which Daniel or his heirs would or might have been entitled" under the will. In all other respects the codicil confirms the will. The rentcharge is defeasible at any time by Daniel's alienating it, and thereupon "the lands and the person or persons in possession thereof" are completely discharged from it. If the testator had intended that, by the revocation of the gift to Daniel the lands should go to William, he could have said so in a few words. The intention to give the lands to William rests on mere speculation, but the will contains a clear residuary gift to the daughter, which is confirmed by the codicil, and this must prevail against the gift over to William, which was to take effect only on a contingency which has not happened, and which, even if it had happened, would have operated only upon the defeasance of the revoked gift to Daniel. The gift to William in the will was not a devise of the property subject to an interest in Daniel. It was an absolute gift to Daniel on attaining twenty-six, with a provision for his maintenance in the meantime, and in the meantime William took nothing unless Daniel died. The codicil revoked all this, and substituted a different provision for Daniel, namely, an immediate but inalienable rentcharge. The unsoundness of the argument on behalf of William is shown by asking—Would it be maintainable if Daniel had been twenty-six at the date of the codicil? The gift to Daniel would in that case have been unquestionably absolute at the time of its revocation. The argument against intestacy is met by pointing out that there is an inevitable intestacy as to the difference between £65 and the entire rents, upon the will and codicil, and as to the surplus of the rents above the provision for Daniel's maintenance, upon the will alone, between the dates of the testator's death and of Daniel's attaining twenty-six, and the residuary clause must operate at least upon the property thus left undisposed of. For these reasons it appears to me to be clear, on the will and codicil together, that William never got the property, as Daniel attained the age of twenty-six. William could not have taken the property if the will had not been revoked, and if Daniel had lived till he was twenty-six, and then died before the testator. The confirmation

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(1) 4 K. & J. 709.

(2) 2 Drew. 25.

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of the unrevoked parts of the will only leaves the matter where it was, and William does not get the property simply because his father's will did not give it to him in the event which has happened.

WALKER, L. J. :—

I concur. The effect of the construction put upon this inartificially framed will by the Master of the Rolls is that the eldest son is to take whenever or however Daniel's estate ceases, reading it as subject to the estate given to Daniel.

That construction has been, I think, adopted only when the limitation over involves no incident but what is essential to the determination of the estate previously limited. As in *Avelyn* v. *Ward* (1), the precedent condition was necessarily implied in the failure of the estate which lapsed—in other words, the apparent contingency may be an expression and restriction of the duration of the preceding estate already given; and here Mr. O'Connor pushed the argument for the respondent to its logical consequence, and contended that if Daniel attained twenty-six, and died in the lifetime of the testator, the eldest son would get the estate in spite of the contingency.

Here the estate is given to the eldest son on and only on a contingency by the death of Daniel before attaining twenty-six. Under the decision of the Master of the Rolls he gets it, though that contingency did not happen, and cannot happen, so that in effect he would get a new and different estate. I think the contingency remained, notwithstanding the revocation, as being one collateral to and not involved in the expression of the preceding estate.

As to the argument on the codicil, I am unable to read it as a gift to the eldest son affirmatively, or as taking away the contingency on which the gift to the eldest son depends.

HOLMES, L. J. :—

The testator seems to have been a man of means and position, who probably had other property in addition to what is disposed of by his will. His lands in county Donegal, with a rental of about £150 a-year, he evidently intended as a provision for his second son, who, I would infer, had not inspired his father with much confidence in his steadiness and prudence. Accordingly the Donegal estate was not given to him until he should have attained the age of twenty-six. In the meantime trustees, with the consent of other members of the family, might apply such portion of the rents as they should think right to his maintenance, and might raise a substantial sum for his advancement. Once he attained the age of twenty-six he became absolute owner of the property; and the only interest which the plaintiff, the eldest son, took therein was in the event of his brother dying under the age of twenty-six.

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(1) 1 Ves. Sen. 420.

As the second son had reached the prescribed age at the time of his father's death, he would have become absolute owner, and the plaintiff would have been entirely excluded, if the will had not been previously altered. A codicil, however, had been executed, which revoked the gift to the second son, giving him instead a life annuity, charged on the lands, but which did not, at least in express terms, confer any benefit on the plaintiff.

Under these circumstances, I am unable to see how the latter became entitled. By the will he was only to take the estate if his brother died under the age of twenty-six. Upon what rule of construction am I to strike out this condition? It is argued that the testator intended that if the second son was not to have it the eldest son was. But this is not said in either will or codicil, and I am not at liberty to impute a more extended intention than the language justifies. The intention shown by the will is that the plaintiff was not to become entitled in the events that have happened. The codicil is silent on this subject. The effect of both documents taken together is that the Donegal property goes to the residuary devisee. This may have been what the testator desired, or he may not have considered the matter at all. Whatever was his state of mind, I am of opinion that to decide in favor of the plaintiff would involve either altering the language of the will or adding to the language of the codicil.

Solicitors for all parties: *Richardson & Synnott.*

R. D. M.

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Dec. 21.

O'HANLON *v.* MURDOCK.

(1900. No. 162.)

Landed Estates Court—Sale of growing timber—Subsequent sale of lands—Purchaser with notice—Refusal by purchaser to allow timber to be cut and removed—Conveyance without reservation—Personal equity—Right to cut and remove timber—Injunction.

Certain timber, growing on lands which were under the control of the Landed Estates Court, was ordered by the Judge to be sold by the receiver, and accordingly the timber was sold by public auction. The lands were subsequently sold to a purchaser, who had full notice of the sale of the timber. The purchaser of the timber shortly afterwards entered on the lands for the purpose of cutting and removing the timber. The purchaser of the lands refused to allow this. Subsequently a Landed Estates Court conveyance was executed to the purchaser of the lands, without, however, any reservation of the timber:—

Held, that the purchaser of the timber was entitled to an injunction to compel the defendant, who was the successor in title of the purchaser of the lands, to allow him to cut and remove the timber, although not reserved by the conveyance, inasmuch as the purchaser of the lands had purchased with full notice of the sale of the timber, and there was therefore such an equity affecting his conscience, as to preclude his successor in title from relying on the effect of the Landed Estates Court conveyance.

By an order dated the 7th December, 1898, Ross, J., in the matter of the Estate of O'Reilly, deceased, directed the receiver to sell certain timber, growing on the estate. In pursuance of this order, the timber was sold by public auction on the 9th, 10th, and 11th February, 1899, and the plaintiff became the purchaser of about 300 trees, for a sum of about £75. Messrs. Henderson & Wallace, timber merchants, of Belfast, also purchased a similar lot of timber, which the plaintiff repurchased from him for £90 18*s*. The receiver directed one of the conditions of sale to be, that the timber should be cut and removed on or before the 20th April, 1899. Before that date the lands of Baltrasna, upon which the timber was growing, were sold by the Land

Judge to Alexander Murdock, father of the present defendant, and he went into possession of the lands on the 13th April, 1899. Prior to the 20th April, 1899, the plaintiff had removed a small portion of the said timber off the lands; but upon the 21st April, 1899, the plaintiff proceeded to enter on the lands for the purpose of removing the remainder of the trees, but was refused admittance. Upon the 28th July, a Landed Estates Court conveyance was executed to Alexander Murdock of the lands of Baltrasna, but it contained no reservation of the above-mentioned timber. The said Alexander Murdock died before the date of the present proceedings, leaving the defendant, his son, him surviving, who as heir-at-law entered into possession of the lands. It was conceded at the trial that Alexander Murdock, at the time he was declared the purchaser of the lands, was fully aware of the sale of the timber, but there was a conflict of evidence, as to whether the time fixed for the cutting and removal of the timber had been extended by the auctioneer in the case of timber growing on other than grass lands.

In the present action the plaintiff claimed an injunction, to restrain the defendant from preventing him from cutting and removing the said timber.

Campbell, *Q.C.*, *Brown*, *Q.C.*, and *Williamson*, for the plaintiff:—

The defendant's father purchased with full notice of the sale of the timber, and consequently there was such a personal equity affecting the purchaser's conscience, as to preclude a reliance on the Landed Estates Court conveyance by him or his successors in title: *In re Ruthven's Estate* (1); *Sexton* v. *M'Grath* (2); *Chute* v. *Lindesay* (3).

Matheson, *Q.C.*, *Gordon*, *Q.C.*, and *H. Wilson*, for the defendant:—

We hold under a Landed Estates Court conveyance, which does not reserve the timber. Whatever right the plaintiff might otherwise have had is, therefore, gone.

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(1) 19 L. R. Ir. 330, 336. (2) Ir. R. 6 Eq. 381. (3) *Ibid.*

It is contended that there is such a personal equity, binding on the conscience of the purchaser of the land, as to bring the case within the principle laid down in *Ruthven's Estate* (1), and the cases referred to therein. In those cases, however, the purchaser, having paid the purchase-money, had become the equitable owner in fee of the lands, and before the execution of the conveyance had given rights for value, which were held binding on him. But that only applies to a dealing by a purchaser with his own estate, and not to rights acquired by a third party, independently of the equitable owner of the lands. Apart from this the contract is not in writing, and, therefore, fails to satisfy the Statute of Frauds: it was a personal contract, and cannot bind the heir-at-law. If any action lay, it should be against Murdock's executors: *Wakley* v. *Froggatt* (2). The timber was sold expressly on the condition that it should be cut and removed before a fixed date, but this the plaintiff failed to do, and he has, therefore, forfeited his right (if any) to do so.

Brown, Q.C., in reply:—

The contract is said to be void under the Statute of Frauds, but the statute is not pleaded, and the entry in the auctioneer's book, who was acting as agent for both parties, of the purchaser's name is a sufficient signature, on his behalf, to satisfy the statute: *Sims* v. *Landray* (3). It is also contended that the plaintiff, having failed to cut and remove the timber before the 20th April, 1899, has thereby forfeited his right to do so. As to this we submit, on the facts, that the time limit was only to apply to timber growing on grass lands, and as to the other timber, the time was extended by the auctioneer to any time during the summer months of 1899. Even if this were not so, time was not of the essence of the contract. Trees are within the definition of goods in the Sale of Goods Act, sect. 62; and under sect. 10 conditions and stipulations as to time are not to be deemed of the essence of the contract, unless under special terms, making time the essence of the contract.

As to the effect of the Landed Estates Court conveyance, at

(1) 19 L. R. Ir. 330, 336. (2) 2 H. & C. 669. (3) [1894] 2 Ch. 318.

the time the plaintiff entered for the purpose of cutting and removing the timber, the conveyance had not been executed. The purchaser of the lands was only an equitable owner in fee, taking subject to all existing equities of which he had notice. Where there is a personal equity affecting the conscience of a purchaser, and, consequently, the lands in his hands, the Court will enforce such an equity, notwithstanding the subsequent execution of a Landed Estate Court conveyance, although made without reservation. That is the principle underlying all the cases which have been cited.

Dec. 21.

The Vice-Chancellor:—

This action has been brought to restrain the defendant from interfering with the plaintiff's removing from what are now the lands of the defendant a large quantity of timber purchased by the plaintiff, under the circumstances stated in the plaintiff's claim. The lands had been some years previously ordered to be sold by the Land Judge, in the matter of O'Reilly's estate pending in his Court, and a receiver was appointed over them in that matter, and took up the management of the lands pending the sale. A large portion of the estate was sold, but the lands on which this timber was growing, and some other lands remained unsold from the year 1894 till the purchase by the defendant's father Alexander Murdock. The Court of the Land Judge, when it appoints a receiver pending a sale, has the same powers and performs the same duties, as to the management of the lands, as the Court of Chancery when it appoints a receiver. In the present case the receiver, in the latter part of the year 1898, brought in a statement of facts as to the timber growing on the lands under his charge, and the Land Judge made an order authorising the receiver to have certain specified trees cut and sold. No particular directions were given as to the cutting or sale; and the receiver was left to use his own discretion as to these particulars, with authority to have the cutting and sale carried out. He accordingly in due discharge of his duties under the order employed a competent local auctioneer, who was skilled in such matters, to sell the trees standing, and left it to him to arrange and carry out the sale by auction in the

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usual way. The auction was held in the month of February, 1899, and the plaintiff, who is a large buyer of timber, and several other timber merchants attended. The auctioneer stated as one of the terms of the sale, that the timber must be cut and removed before the 20th April. Here arises the only serious conflict as to matters of fact. The auctioneer swore distinctly and positively, that before the bidding began some of the intending bidders objected to the shortness of the time limited for the cutting and removing of the timber, and that he stated in reply to this objection, that this limit was intended to apply only to trees growing on certain portions of the land, which were to be let for grazing or meadowing, as to which it was necessary to remove the trees at the time named, so as to prevent injury to the growing grass; but that as to trees growing in the woods the purchasers might suit their own reasonable convenience. The auctioneer swears, that this conversation took place on the first day and before the sale began, and that the sale proceeded on the faith of it. The defendant denied that there was any such conversation on the first day of the sale, but said that there was a conversation on the subject on the second day. The auctioneer is corroborated by the evidence of the plaintiff, of a man named Smith, and to a considerable extent by Mr. Henderson, another purchaser who came to the sale, less than half-an-hour after it began, and when only eight or nine trees had been sold. He then had a conversation with the auctioneer, quite similar to that which the other purchasers had had before. Mr. F. Murdock, a brother of the defendant, who stated that he was present throughout the sale, denied that any such conversation took place on the first day of the sale, but stated that on the second day there was a conversation as to the time of removal, but he denied that the auctioneer said at any time that the restriction applied only to the grass lands, and that as to the woodlands the purchaser might remove the trees at his convenience. On the whole of this evidence I am satisfied that the auctioneer's statement of what occurred is true and correct, and that he did, before the sale began, state to the buyers and others present that this restriction of the time of removal should apply only to the trees growing on the grass lands, and that the sale proceeded on these terms.

I am of opinion that it was competent to the auctioneer to arrange the conditions of sale, and that his action in doing so was in effect the act of the Court. The prices of the trees sold to the plaintiff, and of those which were bought by Henderson, and which the plaintiff took over from him, were paid to the auctioneer for account of the receiver, and must have been duly accounted for by him and thus brought into Court to the credit of the matter of O'Reilly's estate. These sums never belonged to the purchaser of the lands. Alexander Murdock, the purchaser of the lands, knew beyond doubt the facts of the case when he purchased the lands; he knew that these trees had been bought at a sale held by order of the Land Judge, and carried out by the receiver, and that the price of them had been paid by the purchasers of them. In fact he knew that these trees were never sold to the purchaser of the lands, and that they could not have been intended to be sold to him as they had already been sold by the Court to the buyers of them, and the money paid for them was virtually in the hands of the Court.

Notwithstanding all this, he claims now to be entitled to all the timber standing on the lands at the date of his conveyance. Of course apart from the statutory enactments giving a Parliamentary title he could not sustain his claim, as he had purchased with actual notice, and even knowledge, of the property in these trees being in the plaintiff, when he (Murdock) bought the lands. Such a claim would be an attempt to commit a gross fraud through the medium of the Landed Estates Court, and to sustain this claim by the extraordinary powers given by the Legislature to that tribunal. It would, in fact, be to enable a purchaser to commit a gross fraud by the help of these powers. The cases which have been decided on this subject have established the principle that whenever a purchaser seeks to shelter himself under a Landed Estates Court conveyance, he shall not be allowed to do so when his contention would involve a moral fraud on his part, or be a violation of what ought to be binding on his conscience. A trustee for example, purchasing for himself at an undervalue will not be allowed to retain any advantage he may have gained to the prejudice of his *cestui que trust*, even though such purchase was made under the statutory powers of the Court from which he

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purchased. The principle appears to me to be this, that the lands sold are in themselves absolutely discharged by the conveyance from the Court from all former and other estates, rights, &c., of all persons whomsoever, but that the purchaser is not discharged from obligations affecting his conscience in respect of the interest he has so acquired, nor from the equities attaching upon himself personally in respect of it. The present claim of the defendant is to be entitled to make use of his position, as owner of the lands, to defeat the right of the plaintiff to the timber by preventing him from entering on the lands to remove it. Even if it were a purchase out of Court, and assuming that he had notice of the facts, I do not think that this Court would permit him to use the ownership of the lands acquired by his purchase to prevent the owner of the timber from using his rights to the removal of it, when he had full knowledge of the facts, and was fully awake to the position of the plaintiff. He knew that the plaintiff had purchased it and paid for it, while he himself had neither purchased it nor paid for it. But it seems a much worse attempt, when we remember that the timber had been duly sold by the Court and paid for to the Court, and that the Court had contracted with the buyer of it that he should have time to remove it, all of which matters he had full notice of, when he conceived the intention of buying the lands. I think that there is some reason to suspect that the desire to get the timber had something to do with this, but it is not necessary to push the case so far.

It was contended by the defendant that the alleged delay in the removal of the timber operated as a forfeiture of it on its being removed within the prescribed time. This contention appears to me to be without foundation. There was no such condition expressed; nor is there ground for holding that time was of the essence of the contract.

I am accordingly of opinion that the conduct of the defendant in preventing the removal of the timber was wrongful, and shall grant an injunction as prayed and an inquiry of damages, the defendant to pay plaintiff's costs.

Solicitors for the plaintiff: *Bell & M'Cartan.*

Solicitor for the defendant: *M'Keever.*

J. MAC M.

FAWCETT, Tenant; COLLUM, Landlord (1).

Appeal.
1900.
Nov. 21, 2
Dec. 20.

Landlord and tenant—Ulster custom—Compensation for disturbance—Compensation for improvements—Holding not within the Land Law Act, 1881 *—Scale of compensation*—44 *&* 45 *Vict. c.* 49, *s.* 6—33 *&* 34 *Vict. c.* 46, *s.* 3.

By lease, dated the 11th September, 1865, C. and his wife demised to F. a holding in the county of Fermanagh for fourteen years, provided Mrs. C. should so long live. After the expiration of the term the tenant remained on as yearly tenant. In 1889 the tenant served notice to fix a fair rent in respect of the holding, but the application was dismissed on the ground that the holding was let for temporary convenience. The landlord served notice to quit, and the tenant filed a claim for compensation for disturbance and for improvements. The County Court Judge awarded to the tenant compensation for disturbance and improvements on the scale set forth in sect. 6 of the Land Law (Ireland) Act, 1881. On appeal to the Land Commission this decision was affirmed:—

Held (by Lord Ashbourne, C., and FitzGibbon and Holmes, L.JJ.; Walker, L.J., *dissentiente*), that the tenant was entitled to compensation for disturbance, only upon the scale set forth in sect. 3 of the Land Act, 1870, and that the holding, being one let for temporary convenience, no part of the Act of 1881 applied to it.

By lease dated the 11th September, 1865, William Collum and his wife demised part of the lands of Loughan, in the county of Fermanagh, containing 130 acres, to James Fawcett for fourteen years, provided Mrs. Collum should so long live, at the rent of £100. After the expiration of the term the tenant remained on as yearly tenant. In 1889 the tenant served notice to fix a fair rent in respect of the holding, but the case was dismissed upon the ground that the holding was let for "temporary convenience." The landlord served notice to quit, and the tenant (James Fawcett's widow) filed a claim under the Land Act of 1870, claiming compensation for disturbance and improvements. On the 1st April,

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(1) Before Lord Ashbourne, C., and FitzGibbon, Walker, and Holmes, L JJ.

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1900.

FAWCETT, *Tenant;* COLLUM, *Landlord.*

1898, the County Court Judge awarded the maximum compensation under both heads, amounting to £474 12*s*., including £400 for disturbance. Both landlord and tenant appealed, but the tenant withdrew, and the case was presented before the Land Commission by the landlord on a question of jurisdiction. The Land Commission affirmed the decree of the County Court Judge, when the following judgment was delivered (July 24th, 1900) by—

MEREDITH, J.:—

The legal questions involved in this case are of great interest and considerable difficulty; fortunately the facts are not in dispute. It appears that by a lease dated the 11th September, 1865, Captain William Collum and his wife demised the holding in respect of which the present claim is made to James Fawcett for a term of fourteen years, provided Mrs. Collum should so long live. After the expiration of the term Mr. Fawcett remained on as yearly tenant, subject, of course, to the conditions of the lease, so far as applicable to a yearly tenancy. By an order of this Court, dated the 14th June, 1889, an application by the tenant to fix a fair rent in respect of the holding was dismissed upon the ground that the holding was let for "temporary convenience." The landlord subsequently served notice to quit, and the tenant in reply filed a claim under the Land Act of 1870. The claimant seeks compensation in respect of disturbance as well as for improvements. The learned County Court Judge awarded compensation under both heads, amounting to £474 12*s*., including £400 compensation for disturbance. Both landlord and tenant appealed, but the tenant withdrew, and the case was presented before us as an appeal by the landlord on a question of jurisdiction. Mr. Henry, for the landlord, expressly admits that sect. 15, sub-sect. 4 of the Land Act of 1870 does not apply so as to exclude this tenancy from the scope and operation of the Landlord and Tenant (Ireland) Act, 1870. There is a well-marked difference between sect. 15, sub-sect. 4 of the Act of 1870 and sect. 58, sub-sect. 7 of the Act of 1881. [His Lordship read both sub-sections.]

Having regard to the facts of this particular case, counsel admits the jurisdiction of the learned County Court Judge to award compensation for improvements, but he asserts that the jurisdiction to award compensation for disturbance in respect of this particular tenancy has been taken away by the Act of 1881. His broad contention is that the Act of 1881 has absorbed the provisions of the Act of 1870 with respect to compensation for disturbance, and that unless the tenancy in respect of which compensation for disturbance is claimed be a tenancy to which the Land Act of 1881 applies the claim must fail. Mr. Henry does not contend that the right conferred by the Act of 1870 has in express words been taken away, but the old scale and measure of that right has been removed, and the new scale is only applicable to tenants holding under tenancies to which the Act of 1881 applies. This is obviously a contention which requires the most careful examination. I propose to consider shortly the various sections of the Acts of 1870 and 1881 bearing upon the questions to be decided. The first of these is section 3 of the Act of 1870. That section provided as follows:—"Where the tenant of any holding held by him under a tenancy created after the passing of this Act is not entitled to compensation under sections 1 and 2 of this Act, or either of such sections, or, if entitled, does not seek compensation under said sections or either of them, and is disturbed in his holding by the act of the landlord, he shall be entitled to such compensation for the loss which the Court shall find to be sustained by him by reason of quitting his holding, to be paid by the landlord as the Court may think just, so that the sum awarded does not exceed the scale following, that is to say," and then follows the scale. I have read the section as it originally stood. Pausing for a moment here to observe that the right to compensation under that section was a valuable right and incident of Fawcett's tenancy at the date of the passing of the Act of 1881, I turn to the sixth section of the last-mentioned Act, which is as follows:—"There shall be repealed so much of section 3 of the Landlord and Tenant (Ireland) Act, 1870, as provides for the scale of compensation, and so much of the same section as declares that in no case shall the compensation exceed the sum of £250, and so much of the same section as declares that a tenant in a higher class of the scale may at his option claim compensation under a lower class and so much of the same section as prohibits tenants of holdings valued at such sums as are in the said section mentioned, and making such claims for disturbance as are in the said section mentioned, from being entitled to make separate or additional claims for improvements other than permanent buildings and reclamation of waste land, and the said section 3 shall hereafter be read as if from such section were omitted the words 'for the loss which the Court shall find to be sustained by him by reason of quitting his holding,' so that the said section shall be read as providing that the tenant therein mentioned shall be entitled to such compensation as the Court, in view of all the circumstances of the case, shall think just, subject to the scale of compensation hereinafter mentioned. The compensation payable under the said section 3, in the case of a tenant disturbed in his holding by the act of the landlord, after the passing of this Act shall be as follows, in the case of holdings"; then follows the scale. The concluding clause of the section is "From and after the passing of this Act the thirteenth section of the Landlord and Tenant (Ireland) Act, 1870, shall be, and the same is hereby repealed."

Now it is plain upon the face of that section that it contains no words expressly depriving any tenant of the right to compensation conferred upon him by the earlier statute. On the contrary, the section seems to contemplate, and indeed emphasize, the continued existence of the right in the case of any and every tenant coming within the provisions of the third section of the earlier Act. The words "so that the said section shall be read as providing that the tenant therein mentioned shall be entitled to such compensation as the Court, in view of all the circumstances of the case, shall think just, subject to the scale of compensation hereinafter mentioned," are to my mind very significant: they are wide enough to embrace, and were apparently intended to embrace, the case of every tenant coming within the provisions of section 3. When we come, however, to the words introducing the new and enlarged scale of compensation we find the following:—"The compensation payable under the said section 3 in the case of a tenant disturbed in his holding by the act of a landlord after the passing of this Act shall be as follows in the case of holdings," and then follows the new scale. Mr. Henry contends that this provision is limited in its scope and operation by section 58 of the same Act of 1881, and that the scale so introduced can only apply to holdings and tenancies which come within the general scope and operation of the Act. This, he argues, is the necessary effect of section 58. "This Act," so runs section 58, "with the exception of so much thereof as amends the Landlord and Tenant (Ireland) Act, 1870, in respect of compensation for improvements, and with the exception of Part 5 of this Act shall not apply to tenancies in," omitting the unnecessary matter—"(7) Any holding let to the tenant . . . for the temporary convenience or to meet a temporary necessity either of the landlord or tenant."

Mr. Henry points to the order of the Land Commission of the 14th June, 1899, dismissing the tenant's application to fix a fair rent in respect of this holding, and argues that, as it has been conclusively decided, that "this Act" does not apply to the present holding, so as to enable the tenant to have a fair rent fixed, it must also be decided that the Act does not apply so as to enable the tenant to claim compensation for disturbance under the self-same Act. In truth, there is here a difficulty of the gravest character; but as Mr. Hume pointed out in his argument on behalf of the tenant, the contention of the learned counsel for the landlord appears to go too far. If the Act of 1881 does not apply to the holding before the Court, how can the earlier portion of sect. 6, repealing so much of sect. 3 of the Act of 1870, as provides for the scale of compensation, be made applicable? This argument impresses me greatly. At one time, indeed, it appeared to me that it might afford a complete solution of the difficulty, for if it were possible to hold that the Land Act of 1881, *quoad* this particular holding and tenancy, had no effect or operation whatever, then the tenant's right under the Act of 1870 would remain, the old scale would be preserved for the benefit of him and other tenants similarly situated, and he would be entitled to compensation under and measured by the provisions of sect. 3. On careful consideration, however, I am unable to adopt this middle course; the emphatic language of the opening and concluding portions of sect. 6, negatives, in my opinion, the possibility of limiting the repealed clauses to the case of tenancies to which the Act of 1881 applies. I fail to see how, consistently with the language employed, I could hold that the 6th section operated by way of partial or conditional repeal, and thus read the entire section as if it were prefaced by the words, "so far as regards tenancies to which this Act applies, there shall be repealed, &c." To do so it would be necessary to read the words "the tenant *therein* mentioned," as "the tenant *herein* mentioned," and the emphatic and absolute language in which the repeal of portions of the 6th section and the entire of the 13th section is couched, should be read in a restricted or conditional sense. It seems to me, therefore, that the express and particular enactment in sect. 6 ought not, in the absence of overwhelming reasons, to be controlled and cut down by the general words in sect. 58. No doubt the express reference in sect. 58 to compensation for improvement creates a difficulty, but there are difficulties on every side and in every aspect of this case. The Court must endeavour to ascertain the real intention of the Legislature on a careful review of the entire statute; and when I turn to the 57th section of the Act of 1881, I think I can discern a clear indication on the part of the Legislature of an intention to prevent absorption by implication or general words. The last clause of sect. 57 of the Act of 1881 is as follows:—"Any words or expressions in this Act which are not hereby defined, and are defined in the Landlord and Tenant (Ireland) Act, 1870, shall unless there is something in the context of this Act repugnant thereto, have the same meaning as in the last-mentioned Act, and the Landlord and Tenant (Ireland) Act, 1870, except in so far as the same is expressly altered or varied by this Act or is inconsistent therewith, and this Act shall be construed together as one Act." I read that clause as indicating that there are or may be cases in which the Landlord and Tenant (Ireland) Act, 1870, as expressly altered or varied by the Act of 1881 may stand alone, and I hold that this is one of those cases.

At the risk of appearing unnecessarily to repeat myself, I read from sect. 6, the potent words, "And the said section 3 shall hereafter be read as if from such section were omitted the words, 'for the loss which the Court shall find to be sustained by him by reason of quitting his holding,' so that the said section shall be read as providing that the tenant therein mentioned shall be entitled to such compensation as the Court in view of all the circumstances of the case shall think just, subject to the scale of compensation hereinafter mentioned." Then immediately follow the words, "the compensation payable under the said section 3, in the case of a tenant disturbed in his holding by the act of a landlord after the passing of this Act shall be as follows, in the case of holdings, etc." It seems to me to be in accordance with the ordinary rules of construction to hold that the word "tenant" in this clause is wide enough to embrace the case of "the tenant therein mentioned" in the immediately preceding clause, and, I think, the provisions of sect. 57 justify me in holding that the third section of the Act of 1870 as expressly altered and varied by the 6th section of the Act of 1881, including the new and enlarged scale of compensation, can be read as an independent enactment, the benefits of which are not confined to the class of tenants upon whom absolutely new rights are conferred by the statute of 1881. For these reasons I hold that the decision of the County Court Judge was correct in principle, and as all questions as to amount were waived, the appeal must be dismissed with costs.

My colleague, Mr. Commissioner Fitz Gerald, concurs with my judgment.

The landlord appealed from so much of the order as awarded compensation for disturbance under the Act of 1881, but consented to allow the tenant the full sum awarded by the County Court Judge as compensation for improvements, and the maximum compensation for disturbance under the provisions of the Land Act of 1870.

Henry, Q.C., and *Maxwell*, for the appellant:—

This holding being a letting for temporary convenience is excluded from the Land Law Act, 1881, s. 58, sub-s. 7; and the opening words of sect. 58, provide that this Act with the exception of so much thereof as amends the Landlord and Tenant Act, 1870, in respect to compensation for improvements shall not apply to such tenancies. Consequently, so far as compensation for disturbance is concerned, the Act of 1870 is the only Act that can apply to that, and by section 3 the tenant is entitled to two years' rent as a maximum. The only way you can give a proper construction to the Act is to treat the Act of 1881 as varying the Act of 1870 as to certain tenancies. Meredith, J., read the two Acts of Parliament together, but that leads to the absurdity of having two different definitions of "temporary convenience," because by section 15 of the Act of 1870 in order that a holding should be let for temporary convenience it must be so expressed on the face of the document. It was a class of holding as to which fixity of tenure was not conferred. The Act of 1881 must be taken as a whole, the fair rent sections should not be taken by themselves, and the rest of the Act by itself.

The difference between compensation for improvements, and compensation for disturbance is explained in *O'Donovan* v. *Kenmare* (1).

Hume, Q.C., and *Chambers*, for the respondent.

We contend that we are entitled to the scale of compensation for improvements and disturbance set forth in the Act of 1881.

The Land Commission has no jurisdiction to take into account any matters that have occurred since the date of the decree appealed from: *O'Connor* v. *Perry* (2). Where one clause of an Act of Parliament directs specific acts to be done, but which acts would be included in the general terms of a subsequent prohibiting clause, the former clause is not controlled by the latter: *De Winton* v. *Mayor of Brecon* (3). Section 6 of the Act of 1881 directs section 3 of the Act of 1870 to be read in a particular way; section 58 excepts various tenancies from the Act of Parliament, but section 6 is a specific enactment, and therefore it must prevail. Section 6 of the Act of 1881 is by express direction to be construed as part of the Act of 1870; and the tenancies to which it is to apply are not the tenancies within the Act of 1881, but the tenancies within the Act of 1870. The words in section 6 are "so that the said section," *i.e.* section 3 of the Act of 1870, shall be read as providing that "the tenant therein" (the Act of 1870) "shall be entitled."

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(1) [1896] 2 Ir. R. 512.

(2) 30 L. R. Ir. 388.

(3) 26 Beav. 533; 28 L. J., Ch. 604.

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Further, if the Act of 1881 is absolutely excluded in all its sections from applying to this holding there could be no appeal to the Land Commission or this Court, inasmuch as sections 47 and 48 would not apply.

Lord Ashbourne, C.:—

Dec. 20.

This is an appeal from the Land Commission, and although it involves some questions of much interest the facts are not in dispute.

By lease dated 11th September, 1865, Captain and Mrs. William Collum demised the holding in respect of which the present claim arises to James Fawcett for fourteen years, provided Mrs. Collum should so long live. After the expiration of the term Mr. Fawcett remained on as yearly tenant, subject to the conditions of the lease so far as applicable to a yearly tenancy. By an order of the Land Commission dated 14th June, 1889, an application by the tenant to fix a fair rent in respect of the holding was dismissed upon the ground that the holding was let for "temporary convenience." The landlord subsequently served notice to quit, and the tenant in reply filed a claim under the Land Act of 1870. The claimant seeks compensation not only for improvements, but also in respect of disturbance. The County Court Judge awarded compensation under both heads amounting to £74 12*s.* for improvements, and £400 for disturbance. Both landlord and tenant appealed, but the tenant withdrew, and the case was presented before us as an appeal by the landlord on a question of jurisdiction.

Although the letting was made for a temporary necessity, still this not being named in the document of letting, the tenant was not excluded from the benefits of the Act of 1870 by its 15th section. Section 58 of the Act of 1881 did away with the necessity of stating the temporary necessity in the document of letting, and this has an important bearing on the whole case.

Having regard to the facts, counsel admits the jurisdiction of the County Court Judge to award compensation for improvements, but he asserts that the jurisdiction to award compensation for disturbance under section 6 in respect of this particular tenancy has been taken away by section 58 of the same Act. His contention is that unless the tenancy in respect of which compensation for disturbance is claimed be a tenancy to which the Land Act of 1881 applies the claim must fail. Mr. Henry does not contend that the right conferred by the Act of 1870 has, in express words, been taken away, but that the new scale is only applicable to tenants holding under tenancies to which the Act of 1881 applies. Section 3 of the Act of 1870 is as follows:—" Where the tenant of any holding held by him under a tenancy created after the passing of this Act is not entitled to compensation under sections 1 and 2 of this Act or either of such sections, or, if entitled, does not seek compensation under said sections or either of them, and is disturbed in his holding by the act of the landlord, he shall be entitled to such compensation for the loss which the Court shall find to be sustained by him by reason of quitting his holding, to be paid by the landlord as the Court may think just, so that the sum awarded does not exceed the scale following, that is to say"; and then follows the scale.

The right of compensation under that section was an incident of Fawcett's tenancy at the date of the passing of the Act of 1881, the 6th section of which is as follows:—" There shall be repealed so much of section 3 of the Landlord and Tenant (Ireland) Act, 1870, as provides for the scale of compensation, and so much of the same section as declares that in no case shall the compensation exceed the sum of £250, and so much of the same section as declares that a tenant in a higher class of the scale may at his option claim compensation under a lower class, and so much of the same section as prohibits tenants of holdings valued at such sums as are in said section mentioned, and making such claims for disturbance as are in the said section mentioned, from being entitled to make separate or additional claims for improvements other than permanent buildings and reclamation of waste land, and the said section 3 shall hereafter be read . . . as providing that the tenant therein-mentioned shall be entitled to such compensation as the Court in view of all the circumstances of the case shall think just, subject to the scale of the compensation hereinafter mentioned. The compensation payable under the said sect. 3 in the case of a tenant disturbed in his holding by the act of the landlord after the passing of this Act shall be as follows in the case of holdings," then follows the scale. The concluding clause of the section is—"From and after the passing of this Act the 13th section of the Landlord and Tenant (Ireland) Act, 1870, shall be, and the same is hereby repealed."

That section contains no words expressly depriving any tenant of the right of compensation conferred on him by the earlier statute. Indeed the section seems to contemplate the continued existence of the right in the case of all tenants coming within the provisions of the third section of the earlier Act. Is sect. 6 of the Act of 1881 limited in its scope by sect. 58 of the same Act of 1881, and does the new scale only apply to holdings and tenancies which come within the general operation of the Act? Sect. 58 says:—"This Act, with the exception of so much thereof as amends the Landlord and Tenant (Ireland) Act, 1870, in respect of compensation for improvements, and with the exception of Part 5 of this Act, shall not apply to tenancies in . . .—(7) Any holding let to the tenant . . . for the temporary convenience or to meet a temporary necessity either of a landlord or tenant."

Mr. Henry argues that as it has already, in 1889, been decided that "this Act" does not apply to the present holding, so as to enable the tenant to have a fair rent fixed, it must, the code being one, by parity of reasoning also be decided that the tenant cannot claim compensation for disturbance under the same Act. He is willing to concede that if the Act of 1881 does not apply to the holding before the Court, then the tenant's right under the Act of 1870 would remain, and he would be entitled to compensation under the scale of sect. 3, that is to £200 instead of £400. I am not at once able to see how or why, when sect. 58 of the Act of 1881 declares that sect. 6, with its increased scale, shall not apply to such a holding as the present, that increased scale should be given to the tenant. But if section 6 of the Act of 1881 is not to apply to the holding, is it clear that the tenant is deprived of his previously existing right under the Act of 1870? It was urged on the part of the tenant that she was entitled to £400 or nothing for disturbance. I do not think so. The holding here is excluded from the new section 6, and it would appear to be left under the old section 3. It may not be necessary to decide this, as the landlord offers it, but if it was needed to give effect to my views I should be disposed to so decide. In my opinion the appeal should be allowed with costs.

FITZ GIBBON, L. J.:—

The landlord's appeal from the order of the Land Commission in this case is limited to an application to discharge that order so far as it awards compensation under the Act of 1881, and to vary it by "allowing the tenant the full sum awarded by the County Court Judge as compensation for improvements and compensation under the provisions of the Land Act of 1870, but disallowing all claims based on the provisions of the Land Act, 1881, and for the costs of this appeal."

We have therefore to decide only whether the Land Commission had jurisdiction to award compensation for disturbance up to £400, the limit fixed by the Act of 1881, or whether its jurisdiction is still limited to £200, being the maximum which could be given under the Act of 1870.

This Court has repeatedly declined the difficult, if not impossible, task of speculating upon the intention of the Legislature, where it has included some tenancies and excluded others, under the Land Acts. If the language of the Acts be reasonably clear, we have no right so to speculate, and the question in the present case is simply this—Does the extension of the limit of compensation for disturbance from £200 to £400 by the Act of 1881, sect. 6, apply to Mrs. Fawcett's holding?

I think it right in this case, where it is not raised, formally to reserve the question whether the Act of 1870 is still in force, to fix the compensation for disturbance in other cases. Here the tenant's right to £200 is admitted; I bind the appellant by that admission, I shall deal only with the question whether the extension of the limit by the Act of 1881 applies to Mrs. Fawcett's tenancy.

The undisputed facts are as follows:—The tenancy was created by a lease of September 11, 1865, for fourteen years, determinable on Mrs. Collum's death. After the term had expired, the tenant remained in possession under a yearly tenancy, which by implication was subject to all the conditions of the lease, so far as applicable to such a tenancy. In 1889 the tenant applied to fix a fair rent upon the holding under the Act of 1881, and the originating notice was dismissed, upon the ground that the holding was let for temporary convenience, and was therefore excluded from the fair-rent provisions of that Act.

That order is not now disputed, and the tenancy for the disturbance of which compensation is now claimed, must therefore be taken to have remained to the end a letting for temporary convenience, to which for that reason the Act of 1881 did not apply. Thus the tenant, in claiming compensation to the amount of £400, is driven to found her claim upon an Act the fair-rent provisions of which have been conclusively decided not to apply to her holding.

The material words of the two Acts are few: if we omit what is immaterial, and what applies to other classes of holdings, and discussions upon what affects other holdings, I find myself unable to discover any ambiguity or uncertainty in the words used, as applied to Mrs. Fawcett's holding.

The Act of 1870, sect. 3, says:—"Where a tenant of any holding held under a tenancy created after the passing of this Act . . . is disturbed in his holding by the act of the landlord," which includes this case, "he shall be entitled to such compensation . . . as the Court may think just, so that the sum awarded does not exceed the scale following," with a maximum of £250. Under this scale Mrs. Fawcett cannot get more than £200.

The same Act of 1870, sect. 15, excluded altogether from compensation for disturbance holdings let for temporary convenience, but only where the letting was expressed in the document of letting to be so made. The lease of 1865 was silent on that subject. Therefore Mrs. Fawcett, not being excluded, is entitled to compensation for disturbance, but not exceeding £200, if the Act of 1870, so far as I have quoted it, is still in force.

This provision is open to the observation, which may, perhaps, explain the subsequent legislation, that it conferred upon the tenant the apparently anomalous benefit of entitling him to compensation for a disturbance which the letting contemplated as intended to occur whenever the "temporary convenience"

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should come to an end. This anomaly tends to make it unlikely that the benefit would be extended, and more unlikely that it would be extended by an Act which excluded *all* lettings for temporary convenience. But it is to be said in the tenant's favor that the benefit, once conferred, ought not to be taken away except by an enactment as clear as that which gave it.

I have quoted the only provision in the Act of 1870 which is material to the present question. I now come to the Act of 1881. Sect. 6 provides: "There shall be repealed so much of sect. 3 of the Act of 1870 as provides for the scale of compensation, and so much of the same section as declares that in no case shall the compensation exceed £250, and the said sect. 3 shall hereafter be read . . . as providing that the tenant therein mentioned shall be entitled to such compensation as the Court . . . shall think just, subject to the scale of compensation hereinafter mentioned." The substituted scale follows, and fixes a *maximum* of £400, which Mrs. Fawcett has been awarded.

The case would be clear, if sect. 6 applied to Mrs. Fawcett's holding. But sect. 58 is as follows: " *This Act*, with the exception of so much thereof as amends" the Act of 1870 "in respect of compensation *for improvements* . . . shall not apply to tenancies in . . . any holding let . . . for the temporary convenience . . . either of the landlord or tenant."

I can see no room to doubt either the application of these words to Mrs. Fawcett's holding, or their effect when so applied. The Act of 1881 gave new distinct and valuable benefits to the tenants to whom it applied; it increased the benefits under the Act of 1870; and it altered the classes of tenancies to which that Act as amended by the Act of 1881 was thenceforward to apply. The class to which the fair-rent provisions were to apply was defined by the Act of 1881 itself, and was a smaller class, for the most important limitation of these provisions is that which confines the fair-rent benefits of the Act of 1881 to "future tenants." This limitation cannot apply to the benefits conferred by the Act of 1870 on tenancies which might be created at any time before or after the passing of that Act, until disturbance. The two Acts have different areas of operation. The benefits under each are different. We can not tell why these differences

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exist: we have only to ask—How is Mrs. Fawcett to get £400, which is conferred only by an Act, sect. 58 of which expressly says: "This Act shall not apply" to her tenancy?

The Act of 1881, the Act of 1896, and several other Acts, contain provisions that two or more of the Acts, as mutually amended or varied, shall be read together, and shall be read as one Act; but this can be done only so far as their provisions are consistent. Where they are inconsistent, the latest provision must prevail.

The repeal of the scale, and the raising of the *maximum* compensation for disturbance fixed by the Act of 1870, are effected by the Act of 1881, sect. 6, and are part of that Act; and sect. 58 expressly forbids the application of any part of that Act to Mrs. Fawcett's holding, except the amendment as to compensation for improvements. The landlord admits that the tenant is entitled to compensation *for improvements* under the amended law, and also to the compensation for disturbance which is provided for her by the original Act, and I can not give her anything more under the Act of 1881, because it tells me that, except as to improvements, it shall not apply to her tenancy.

The express exception from the *non*-application of the Act of 1881 "of so much thereof as amends the Act of 1870 in respect of compensation for *improvements*" is to my mind conclusive that the amendment in respect of compensation for *disturbance* can not apply, and makes it impossible to treat the disturbance and fair-rent clauses as if they were separate Acts of Parliament. So treating them would not help the tenant, unless it enabled us to read the words "This Act," in the Act of 1881, as meaning something less than the Act. There are separate sets of rights, one for tenants on quitting their holdings, the other for statutory tenants, but all these rights are created by one code, of which "this Act" is part, and it deals with both. For these reasons I am of opinion that the appellant is entitled to have the order of the Land Commission varied as prayed in the notice of appeal.

The notice of rehearing before the Land Commission disputed the order of the County Court Judge *in toto*: it was only at the rehearing that the landlord's claim was limited to reducing the compensation for disturbance to £200. I, therefore, think that the tenant should have her costs before the Sub-Commission and before the Land Commission, but that she must pay the costs of the appeal, to be set off, so far as necessary, against the costs below, when taxed.

WALKER, L.J. :—

I feel difficulties, to my mind insuperable, in arriving at the conclusion that £200 is the legal limit, or maximum, of Mrs. Fawcett's compensation for disturbance; and I do not think we can avoid the question of deciding whether that limit has legal existence by adopting the statement made by the appellant's counsel that they do not dispute that she is entitled to £200, and, therefore, that the Court has nothing to say to that question.

I think the point is a most important factor in the construction of the legislation, and I do not think our only consideration is whether there is an extension from £200 to £400, because that seems to assume the existence of the lower maximum after the Act of 1881 passed.

In my opinion the maximum compensation for disturbance is to be found in the scale fixed by the 6th section of the Act of 1881, and that no other scale has any legal existence.

A very strong argument was put forward in support of the view which my colleagues take—at first sight a plausible one—viz. that it would be unreasonable to suppose that the scale was increased by the Act of 1881 in favor of a kind of tenancy which is itself excluded by the 58th section of the Act of 1881. This would hardly be sound if it was based on fact, because it is only a maximum scale which is provided, and its application would be controlled by the character of the tenure and circumstances of the case; but the argument altogether loses sight of the true construction of the 58th section of the Act of 1881, so far as regards tenancies for temporary convenience. The argument has application only to the first branch of the temporary convenience exception, viz. the words "any holding let to the tenant for the temporary convenience or to meet the temporary necessity either of the landlord or tenant"; but what about the second branch which arises under the proviso and applies to all temporary convenience lettings made after the passing of the Act of 1881, and to which *ex hypothesi* the Act of 1881 applies? It is "Provided that any such letting made after the passing of this Act shall be by contract in writing which shall express the purpose for which such letting is made," *i.e.* that a temporary convenience letting which does not fulfil those conditions is saved out of the exception, and is not hit by the Act of 1881 at all.

Take then a letting after the Act of 1881 either by parol, or not expressing the purpose for which that letting is made, that would not be excluded, and as it would be a future tenancy it would carry with it the right of claiming for disturbance, and on the very argument of the appellant the scale applicable would be that fixed by the Act of 1881, and yet such a tenancy coming under the proviso would be almost the very form of temporary convenience letting in Fawcett's case, so that the Act of 1881 itself fixes a maximum in that case which it is said it would be unreasonable to apply to Fawcett's tenancy. That argument therefore disappears; I do not see how it can be contended that after the Act of 1881 passed there were in existence two scales of compensation for disturbance to be applied according to the reading of the 58th section of the Act 1881. Confessedly, this tenant was within section 3 of the Act of 1870, and not excluded by section 15 of the Act.

This section 15 excludes from compensation for disturbance demesne-land tenants, town-park tenants, pasture tenants not under £50 valuation, saving, however, as regards these three their right to claim for improvements. It excludes absolutely—service tenancies, conacre holdings, temporary convenience lettings, *i.e.* where let and expressed in the document of letting to be so let, and the letting of which has determined by reason of the cesser of the cause. It also excludes cottage allotments not exceeding one-quarter-acre, and (I think this is not immaterial) the Act excludes also from disturbance tenants holding under a lease made after the Act for thirty-one years. It does not exclude "home farms." It was certainly contemplated that the disturbance code fixed by the Act of 1870 should be a single one applicable in all cases.

The 57th section of the Act of 1881 says that the Act of 1870,

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except as varied by or inconsistent with the Act of 1881, and the Act of 1881, shall be construed together as one Act.

The first material consideration is what is the true construction of section 6 of the Act of 1881? This must be clearly ascertained before section 58 is taken up. There is an absolute repeal of certain parts of section 3 of the Act of 1870. Those parts cease to exist as law; they are four in number—the scale of compensation; the maximum of compensation; the option given by section 3; and the prohibition in certain cases of making separate or additional claims for improvements other than permanent buildings and waste land; and the section does not stop there, for it says—"and the said section 3 shall hereafter be read as if from such section were omitted the words 'for the loss which the Court shall find to be sustained by him by reason of quitting his holding,' so that the said section shall be read as providing that the tenant therein mentioned shall be entitled to such compensation as the Court in view of all the circumstances shall think just, subject to the scale" annexed. I read that as meaning what it says, that after the Act of 1881 the tenant mentioned in the Act of 1870 shall in all cases make his claim for disturbance under the substituted provision—substituted as of the date of 1870, and not under one absolutely repealed; and, unless he can claim it under that, it seems to me he has no scale to claim under, for it becomes—to use its own words—"the compensation payable under section 3" instead of what had been there originally. The same section makes this legislation on this point complete by repealing section 13 of the Act of 1870, which was a clog on the claim for compensation.

I read that section 6 as an independent provision in the Act of 1881, altering the disturbance code of the Act of 1870, and having no connection with the Act of 1881, though the opportunity was taken by sect. 6 of making the alteration, and that altered form must be applied whenever its application is called for. The seventh section stands in a diferent position altogether. It is introduced with two objects, one with reference to and in furtherance of the legislation contained in sect. 8, sub-sect. 9 of the Act of 1881, and another for extending the class who could claim improvements under the Act of 1870, or claim the benefit of them as read under the Act of 1881. Sect. 8, sub-sect. 9 of the Act of 1881, says, " no rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title." Sect. 7, therefore, applies to both Acts, and necessarily forms a part of the Act of 1881.

If it had not been for section 58 the case would not be arguable; but there is no doubt that the introductory words of that section create a difficulty which I feel and Judge Meredith felt, and which my colleagues consider insuperable. They are:—" This Act, with the exception of so much thereof as amends the Landlord and Tenant (Ireland) Act, 1870, in respect of compensation for improvements, . . . shall not apply to," &c., and then follow certain subjects which are excluded from the Act of 1881. Six of these are the same as are excluded from the Act of 1870, and then are added " home farm "—a holding for temporary convenience, such as here Fawcett had—an additional one-quarter acre of cottage allotment, and " glebe." Take glebe. This is excluded from the disturbance section of the Act of 1870, not by the words " This Act shall not apply to," but by express legislation, " No such ecclesiastical person shall in respect of such glebe be entitled to make any claim for compensation under any of the provisions of the Landlord and Tenant (Ireland) Act, 1870, or of this Act." Then do the words " This Act," and the exception annexed to it qualify or limit the repeal and substitution already made by sect. 6 in the form I have mentioned. It must be remembered that the Act of 1881 has not disturbance as an object, but the contrary of it—fixing a fair rent and rights of sale, and it would seem to me the fair reading of sect. 58 is that fair rents shall not be fixed in the following excluded cases, nor shall the other rights conferred by the Act extend to them. The disturbance code, which only comes in when a tenant is compelled to quit may well stand by itself, with its alterations under sect. 6. No doubt the difficulty is greatly increased, and I would almost say mainly created by the exception following the words " This Act," viz. " with the exception of so much

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thereof as amends the Landlord and Tenant (Ireland) Act, 1870, in respect of compensation for improvements." This exception seems to have originated in the fact that this amendment applied to both the 1870 and 1881 Acts. Still I think the provision as to the disturbance scale may well stand by itself, and sect. 58 be read as applicable only to the objects of the Act of 1881. I am much influenced in this by the conclusion I have formed, that there can be only one scale after the Act of 1881 passed.

The subsequent legislation in the Act of 1896 rather confirms me in the view I have taken. The Act of 1870 is, both by definition and enactment, left out of the code, which the Act of 1896 deals with.

The code is called the Land Law Acts, which is defined to mean "The Land Law (Ireland) Act, 1881," with six other Acts named, "and does not include the Landlord and Tenant (Ireland) Act, 1870, except so far as the provisions of it are necessary for giving effect to the above-mentioned portion of the Land Law (Ireland) Act, 1881," and sect. 5 of the same Act is, in my opinion, very important. It says:—"The Land Law Acts, except sect. 7 of the Land Law (Ireland) Act, 1881, which amends the Landlord and Tenant (Ireland) Act, 1870, in respect of compensation for improvements shall not apply to the following tenancies," and then follows a number of excepted ones, which materially alter those in the 58th section of the Act of 1881. So far as regards that fifth section, it certainly is framed only with the object to which I have thought this 58th section may be limited, including the exception of the seventh section referred to.

It is also remarkable that though the Act of 1896 repeals most of the exceptions contained in the 58th section, all those in sect. 15 of the Act of 1870 are left untouched, and since 1881 the right to fix fair rents has gone on continually extending to new subjects, without regard to the rights to claim for disturbance.

I should have been content in the present case to simply mention my inability to agree, if it were not that my opinion in favour of the tenant concurs with that of Mr. Justice Meredith. I think it is due to him, as I concur with him, to state not only the fact of my concurrence, but also the grounds on which I rest it.

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Holmes, L. J.:—

The question arising in this case does not admit of much discussion, although I recognize its difficulty. It has been settled by judicial decision, and cannot now be controverted, that the letting under which the tenant claims, was made previous to the passing of the Land Law (Ireland) Act, 1881, to meet a temporary necessity of the landlord, but that this was not expressed in the document of letting. If the Act of 1881 had not been passed, the tenant on being disturbed in the holding by the act of the landlord—an event that has happened—would be entitled to compensation in accordance with the terms and scale contained in the third section of the Landlord and Tenant (Ireland) Act, 1870, which in the case of a holding, subject to the rent payable by this tenant, was not to exceed the sum of £200. Being disturbed, she applied for compensation in the prescribed manner, and she has been awarded £400. The award of this amount is sought to be justified by reference to the 6th section of the Act of 1881 which repeals certain portions of the 3rd section of the Act of 1870, including the scale for compensation thereby provided, and substitutes for it another scale which has the effect of increasing the maximum in the case of a holding rented, like the present, to £400. Up to this point there is no difficulty. The 3rd section of the Act of 1870, being read as amended, clearly gives the tenant, to whom it applies, the right to receive the full sum of £400 as compensation, if the Court thinks it just to award it; and the County Court Judge having awarded it, the amount, in so far as it depended upon his discretion, was not disputed at the hearing before the Land Commission.

There is admittedly ample subject-matter for the operation of the 3rd section of the Act of 1870 as amended; but the sole point of the present case is whether it applies to a tenancy of the kind with which we are now dealing. The 58th section of the statute of 1881 provides that the Act, with the exception of so much thereof as amends the Landlord and Tenant (Ireland) Act, 1870, in respect of compensation for improvements, and with the exception of Part V. shall not apply to certain tenancies, including tenancies let to meet a temporary necessity of landlord and tenant. The amendment of the law as to compensation for

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improvements is contained in the 7th section; and it is clear that the operation of the provision is not limited by the 58th; but it seems just as clear if regard is had only to the language of the last-named section, that the 6th section does not apply to such a tenancy as is the subject of this appeal. If this result was repugnant to the intention to be gathered from the whole of the enactment, or led to contradiction or absurdity, I might struggle to escape from it; but beyond the words themselves I find no clue to what was intended by them. It is possible that the 6th and 58th sections received their present shape through some oversight. If I might hazard a guess, I would say that it was at first intended that the exemptions or exceptions in the 58th section should be identical with those in the 15th section of the Act of 1870, and that the provisions of the Act of 1881, being originally drafted on this basis, were not afterwards adapted to changes introduced into the description of the excepted tenancies. But if this be the explanation, I have no means of knowing what alteration would have been made in the Act, if this oversight had not occurred. Taking the sections as they are, I find nothing therein to deprive Alice Fawcett of the right to compensation for disturbance conferred on her by the Act of 1870. No doubt some of the previous provisions regarding this kind of compensation are repealed, but only for the purpose of substituting for them other provisions more beneficial to the tenant. It is, I think, impossible to hold that a repeal with the object of giving the tenant something which she had not before, has the effect of taking away from her what she already had. On the other hand, it would be extraordinary if a section which the statute declares is not to apply to Alice Fawcett's tenancy, should double the compensation to which she would have been otherwise entitled. For this is not a matter of inference or implication. It is the unequivocal language of the 58th section, *Absoluta sententia expositore non eget.* If the tenant is asked, what entitles her to £400 compensation for disturbance, she can only answer, the 6th section of the Act of 1881 taken in connexion with the 3rd section of the Act of 1870. Neither section would be sufficient without the other; but the Act of 1881 is not to apply to her case. How then can she be

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awarded the £400? Surely, the true rule of construction is to see whither we may be led by following the language of the Legislature to its natural conclusion, before seeking to strain it or depart from it in search of an imaginary intention, or consistency. In the cases of tenancies to which the Act of 1881 does not apply, let the 3rd section of the Act of 1870 be read in its unrepealed and unamended state. There is nothing unreasonable or absurd in repealing or amending an enactment for one purpose and in leaving it standing for another. This, in my opinion, is the effect of the provisions, as they now exist. They have been drafted clumsily, and the meaning might have been made clearer: but there is no real ambiguity, and any other construction would be inconsistent, on the one hand, with the declaration that the Act of 1881 gives this tenant nothing, and, on the other, with the absence of words, taking away from her the right she had before.

Solicitors for the tenant: *Allen & Halpin.*
Solicitor for the landlord: *Samuel Jones.*

R. D. M.

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May 2, 3, 4.

LORD CLONCURRY, LANDLORD; ROBERT HEUSTON, TENANT (1).

Landlord and tenant—Land Law (Ireland) Acts—" A holding let to be used wholly or mainly for a dairy farm"—Land Law (Ireland) Act, 1896 (59 *&* 60 *Vict. c.* 47, *s.* 5 (1) (*c*)).

The statutory *genus* of holdings which are let to be used wholly or mainly for the purpose of pasture contains within it a statutory *species* of holdings let to be used wholly or mainly for dairy farms. With the exception of this single named *species*, the statutory *genus* is (subject to certain conditions of value, residence, and user) excluded from the provisions of the Land Law Acts.

The principles by which it is to be ascertained whether any individual holding falls within the *species* are the same as those by which, in the first instance, it is determined to come within the *genus*. Where the contract of letting does not fix, either by express terms or by implication, the uses which the tenant is to make of the holding, the purpose, which must be a purpose common to both landlord and tenant at the date of the letting, is to be proved as a matter of fact by considering the natural capabilities and equipment of the subject-matter of the contract, its user under the contract, and the circumstances attending the making of the contract.

The principles above stated, illustrated in the case of a holding which was, in the year 1895, ruled out of the provisions of the Land Law (Ireland) Acts, 1881 and 1887, on the ground that it was let to be used for purposes of pasture, but which was now, on the evidence, held to come within the exception from this exclusion created by section 5 (1) (*c*) of the Land Law (Ireland) Act, 1896.

APPEAL by the tenant from the decision of the Irish Land Commission, reversing the order of the Sub-Commission, who fixed a fair rent on the holding.

The holding was situated in the county of Limerick, about ten miles from Limerick City and two miles from Boher railway station. It was in two divisions, about a mile apart, the larger division in the townland of Dromeliagh, consisting of about 178 statute acres, exclusive of roads; and the smaller division, in the

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(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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townland of Rath, consisting of about 63 statute acres, exclusive of roads. The Dromeliagh division was originally let under a lease of April 3, 1821, to Richard Philips for one life, or thirty-one years, at the rent of £166. This lease contained no covenant restricting the mode of user of the premises comprised in it, and in 1848 the lessee's interest was purchased by the father of the present tenant. In or about 1850 the tenant's father became tenant from year to year of the Rath Division. The lease of 1821 expired in 1866, and the tenant's father continued in occupation until his death in 1869, when he was succeeded in occupation both of Dromeliagh and of Rath by his son, the present tenant, who in 1879 obtained from Lord Cloncurry the existing lease of the holding comprising both divisions. This lease is dated April 18, 1879, grants a term of thirty years from November 1, 1878, and contains covenants on the part of the lessee not to convert into tillage at any time more than ten acres Irish plantation measure, and not to mow in any one year more than forty acres, the whole produce of which was to be consumed upon the lands. In the year 1895 the tenant sought to fix a fair rent upon the holding, but the Land Commission dismissed his application, on the ground that the holding was let to be used mainly for the purpose of pasture, and this decision was affirmed in the Court of Appeal. On October 8, 1896, the tenant, relying upon the change in the Land Laws effected by the Land Law (Ireland) Act, 1896, sect. 5 (1) (*c*), served a fresh originating notice to have a fair rent fixed, and by an order of the Sub-Commission, June 8, 1899, the fair rent was fixed at £184, the Sub-Commission being of opinion that the holding was let to be used for a dairy farm. From this order both parties appealed to the Land Commission, who re-heard the case, and on the evidence held that the holding was not shown to have been let for a dairy farm, and (December 19, 1899) dismissed the tenant's application to fix a fair rent. From this decision the present appeal was brought.

The evidence showed that the holding was situate in a dairy district, and that the district was of the same character in 1879, when the lease was made. The Dromeliagh portion of the holding was equipped with a dwelling-house and a dairy, forming one building, a cow-house for forty cows, a calf-house, and piggery. These out-offices were erected by the tenant's father in substitution for old out-offices, which were in bad repair. On the Rath division the only building was a substantial herd's house; in the time of the tenant's father portion of this house was used as a dairy, as he kept two dairies, one on Rath and one on Dromeliagh.

A large proportion of the soil was described by the Court Valuers as retentive clay growing a poor quality of grass, and the Sub-Commission classified 205 statute acres as being "bottom pasture, moory clay." The Court Valuers reported that the holding is all suitable for a dairy farm, and the Sub-Commission in their schedule recorded that "it is suitably used as a dairy farm, the only system it is fit for." Witnesses on behalf of the tenant also proved that the lands were naturally best adapted to be used as a dairy farm.

The tenant's father used the entire holding for dairy purposes, having a dairy both on Dromeliagh and on Rath, and the tenant continued to use it as a dairy farm up to 1886, but having only one dairy, on Dromeliagh, to which the milk of all cows on the entire holding was brought. In 1886 the tenant gave up using the holding as a dairy farm, and commenced using it for the purpose of grazing stock. The tenant stated that he gave up dairy farming in 1886, owing to his being appointed to a temporary position in the Land Commission, and consequently being unable to reside in the district, and that he thought he would make more out of the farm by using it for grazing store stock. This latter use was continued down to the year 1895, when the tenant again established a dairy farm on the holding.

The Court Valuers reported that the Dromeliagh division was used as a dairy farm, and let to a dairyman who resided on it, but that the part of the holding in Rath was used by the tenant for the grazing of young cattle and horses. The tenant was questioned as to this, and stated that only forty cows were let to the dairyman, and that he made up the balance of what the holding would carry—fifty to fifty-five cows—as estimated by the Sub-Commission and Court Valuers, with other cattle and horses; that these forty cows were fed both on Dromeliagh and Rath; that he was in the habit of meadowing about twenty acres, *i.e.* about half of

Rath; that the stock seen on Rath by the Court Valuers were calves; that he sometimes had on the holding a number of two-year-old heifers coming into calf, which would be brought into the dairy, the succeeding year; and that he kept both at Dromeliagh and Rath about four brood mares and three or four young horses.

During the years that the tenant kept dairy cows on the holding he generally let the cows to a dairyman under dairy agreements, several of which were put in evidence. These agreements showed that there were let to a dairyman in 1871 and 1872, fifty-three cows; in 1873 thirty-five cows; in 1875 forty-four cows; in 1879, at the time the lease was made, forty-five cows: that in 1880, 1881, and 1882, agreements were made with a man to herd and manage the dairy at a fixed salary; while in 1897, 1898, and 1899, ordinary dairy agreements were made letting the use of forty cows.

It was also proved that the tenant farms other lands near Limerick Junction, about twelve miles distant from this holding, to the extent of 1100 or 1200 acres, and that on these lands he had all kinds of cattle—store cattle, dairy cattle, and fattening cattle—about one-fourth being store cattle.

The tenant gave evidence as to a conversation with Mr. Rynd, the agent of the landlord, in 1879, in reference to the terms of the lease before it was executed, the purport of the conversation being that the limit of ten acres of tillage was fixed as being sufficient for a holding used as a dairy farm; and also that, upon the tenant objecting to the amount of the proposed rent, the agent said "you have told Lord Cloncurry what rent you received from the dairy cattle, and he himself thinks you ought to pay so much rent. You may blame yourself for telling Lord Cloncurry the rent of the dairy cattle." Mr. Rynd, the agent, was dead before the case came into Court, but Lord Cloncurry was not asked any question about the discussion which was alleged to have taken place.

Healy, Q.C., and *A. M. Sullivan*, for the tenant (appellant).

Under the Act of 1896, section 5, sub-section (1) (*c*), the tenant can prove that the holding was let to be used for a dairy farm by evidence analogous to that by which the landlord on his part can show that the holding was let to be used for the purposes of

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pasture. Here the natural capacity and the equipment of the holding show that the user in the contemplation of the parties must have been as a dairy farm: the user proved before the letting, at the date of the contract, and ever since points the same way. If anything were wanting the conversation of the tenant and agent demonstrates that both parties contemplated the place was to be used for a dairy farm.

Cherry, Q.C., and *Jefferson*, for the landlord (respondent).

The terms of the lease show that this holding was let to be used for purposes of pasture. The tenant must show that the only purpose for which it was let was a dairy farm. But there is no evidence here that the farm could not be used for store cattle. Indeed the evidence proves the contrary, for the tenant himself used the entire holding for grazing store cattle for several years, and at present uses part of the land in that way. He admitted that he put store cattle on the land because he could make more out of it by that method. There is no circumstance from which a purpose to use the farm exclusively for a dairy can be inferred. The conversation deposed to is very vague; it took place several years ago, and the agent is dead.

[They cited *Westropp* v. *Elligott* (1); *O'Brien* v. *White* (2); *Battersby* v. *Nicholson* (3); *Eivers* v. *Hamilton* (4); *Ball* v. *Maxwell* (5); *Byrne* v. *Hill* (6); *M'Cormick* v. *Loftus* (7); *Nicholson* v. *Headfort* (8).]

May 4.

FITZ GIBBON, L. J.:—

This is the first case which has come before this Court upon the provision of the Act of 1896, section 5 (1) (*c*), as to dairy farms.

On the grammatical construction of the clause, I do not think it possible to divide the *onus* of proof. Out of the exception of holdings let to be used for pasture, holdings let to be used for dairy farms are excepted.

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(1) 9 App. Cas. 815; 14 L. R. Ir. [319.
(2) 16 L. R. Ir. 15.
(3) 22 L. R. Ir. 38.
(4) 28 L. R. Ir. 464.
(5) 28 L. R. Ir. 468.
(6) 30 L. R. Ir. 603.
(7) [1894] 2 Ir. R. 465.
(8) [1896] 2 Ir. R. 651; 656.

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In strictness, I should hold that the party who desires to exclude a holding from the Land Law Acts on the ground that it is let to be used wholly or mainly for the purpose of pasture, must prove that the case comes within the exception, and therefore must prove—(i) that it is within the pasture exception, and—(ii) that it is not within the dairy exception out of that exception. In practice and in effect, however, the landlord will always endeavour to prove that the holding was let to be used wholly or mainly for the purpose of pasture, and if he succeeds in this, the tenant will then endeavour to prove that it was let to be used as a dairy farm. The evidence on each side will, in most cases, bear upon both points, and the allocation of the *onus* of proof to either party will become of little or no consequence. The conclusion must be drawn from the evidence as a whole, and it will rest on the landlord to prove the exclusion of the holding.

The effect of the section can be best described by using logical terms. It deals with a *genus* and a *species.* The *genus* is the class of holdings let to be used wholly or mainly for the purpose of pasture. The *species* (part of the *genus*) is the class of holdings let to be used wholly or mainly for the purpose of dairy farms. There must first be a letting for pasture generally, and then this must be a letting for the specific pastoral purpose of a dairy farm. It necessarily follows that the distinction must be a fine one, and the evidence which proves that the particular case is within the *species* must also prove that it is within the *genus*.

The words "let to be used," and the word "purpose," are the same, and must be subject to the same rules of evidence, and must have the same construction and effect, in both instances. In the case of holdings let to be used wholly or mainly for the purpose of pasture, these words are governed by authority; after their effect had been long settled, the Legislature used the same phraseology over again as to pasture holdings in general, and repeated it *verbatim* as to dairy farms in particular. We must interpret the words in the Act of 1896 as they had been already interpreted in the Act of 1881. In *Westropp* v. *Elligott* (1), Lord

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(1) 9 App. Cas. 815.

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Selborne, in one passage of his judgment, indicated the idea that the purpose of pasture must be "matter of contract, express or implied": but all the other Lords in that case, and this Court in many subsequent cases, made it abundantly clear that the purpose of pasture may be proved so as to exclude a holding from the Act of 1881, although there is no contractual obligation to use the lands for that purpose.

The previous Acts contain several other instances where the purpose or the object of a letting is material, though there is no agreement, or even mutual understanding, to give effect to it. The Act of 1896, sect. 5 itself, contains some remarkable examples. The Acts shall not apply, sub-sect. (1), (*a*), "to a tenancy in any holding . . . *the main object* of the letting of which was for a residence," nor sub-sect. (1), (*b*) (ii), "land which when first demised was demesne, and which the provisions of the contract of tenancy, *or the circumstances of the case*, show was *intended* to be preserved as demesne or resumed as demesne by the landlord."

In some cases—*e. g.* in the Act of 1881, sect. 58 (7), the contract must "express the purpose," in others—*e. g.* in the Act of 1887, sect. 9, the actual user must follow the purpose of the letting.

But here we have no such requirement, and all the principles and decisions which affect the proof of letting "for the purpose of pasture" must equally apply to letting "for a dairy farm." Purpose on one side is not enough; it must be a purpose common to both parties, so far, at least, as to be an understanding present to the minds of both, as to how the holding is going to be used—for pasture, or for a dairy farm, as the case may be.

The sources of evidence of the purpose have often been enumerated:—1, The terms of the contract; 2, The subject-matter of the contract; 3, The user under the contract; 4, The circumstances attending the transaction.

The tenant in this case, before 1896, attempted to have a fair rent fixed upon this holding. His application was dismissed on the ground that the holding was let to be used mainly or wholly for the purpose of pasture. The tenant on that application made the case that it was let for the particular form of pasture known as dairy farming, and he endeavoured to show that dairy farms

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did not come within the exception in the statute of 1881. He tried to do what the Legislature has since done, and what Lord Fitz Gerald had indicated in *Westropp* v. *Elligott* (1) to be, in his opinion, reasonable; namely, to bring dairy farms into the Land Acts, and to except them from the exclusion of holdings let to be used for the purpose of pasture. We held that, as the law stood at the date of his former application, there was no distinction between dairy farms and other farms let for pasture. Though his attempt failed, it is very much in favour of the *bona fides* of the tenant's present case that he tried to come in on this very ground under the Act of 1881.

Some terms of the letting tend to show that user for a dairy farm was in the contemplation of the parties at the date of the lease. The provision for meadowing is too large for a holding to be used for fattening cattle, especially as all the hay must be consumed on the holding. The amount of meadow shows that it was contemplated that dairy cows were to be fed during the winter on the holding. The provision for tillage supports the same conclusion; and, if not so strong, it is cumulative.

As to the subject-matter demised, it would be hard to convince me that land which was fit for dairy farming could be unfit for pasture in general. But this land is proved to be *more* fit for dairy cows than for store cattle. What do we find on the land? A cow-house capable of containing forty cows, a dairy, a calf-house, and a pigstye. The large cow-house—no mere " byre"—is very significant. It plainly points to a dairy-farm. The shelter which store cattle usually get in that part of the world is provided by a neighbouring hedge or a convenient clump of trees. The calf-house speaks for itself. The pigstye—according to my experience of Munster farming—is most significant; the pig is out of place—he can do nothing but mischief—rooting about on a fattening farm, whereas he is most suitably kept on a dairy farm, where he is the means of turning the offal and refuse into profit. Besides all this, there were on the lands at the date of the letting a herd of dairy cows that must have been worth at least £1000, and the district is one in which dairy farms abound.

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(1) 9 App. Cas. 815.

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Next, take the user. Prior to the lease, there were two dairy farms held under separate contracts; the lessee united them into one holding, and always used the lands for dairying. From the date of the lease until 1886 the united holding was a dairy farm. From 1886 to 1895 it was used for feeding store cattle, but the tenant has since reverted to the former use of the larger and main division of the holding, and has worked it entirely as a dairy farm. There is some doubt whether he had not some store cattle feeding from time to time on the smaller farm, but up to 1886 it certainly was used mainly as a dairy farm.

Lastly, there is the parol evidence of the negotiations for the lease. Evidence of conversations with dead men—indeed of all conversations—must be used with caution; but this evidence is here corroborated by the actual terms of the contract, on the very points which are material—the quantity of tillage and of meadowing to be allowed. The reference said to have been made by the agent to what the landlord had said to him, and the discussion itself, if proved, establish the continuity of purpose on the part of both landlord and tenant. When the agent told the tenant that he had himself to thank for the rent being so high, because he had told the landlord what he got by dairying the lands, it is plain both parties had dairy-farming in their minds as the means of earning the rent. The tenant's evidence about this conversation could have been checked by a living person, because, though the agent is dead, the landlord whom he is said to have quoted is alive.

I am satisfied that the evidence is sufficient to prove not merely a purpose of pasture generally, but a purpose of that specific class of pasture known as dairy farming, and that the decision of the Land Commission must be reversed.

I desire to add, knowing what I do of Munster, that I find it hard to imagine any case to which the new legislation in favour of dairy farms could be proved to apply—short of cases of actual contract, or of written proof such as I never knew to exist in any case—if the evidence in this case were held to be insufficient; and I am satisfied that, if we upheld the decision of the Land Commission, we should render that legislation illusory.

Walker, L. J.:—

I concur. In my opinion this holding is one of that species of pasture holdings, which is described in the Act of 1896, as let to be used for a dairy farm. By sect. 5, sub-sect. 1, dairy farms are treated as a *species* carved out of a *genus* formed by all pasture holdings. Whether a holding is let to be used so as to fall within the *species* is to be ascertained in precisely the same way as you determine whether it is let to be used so as to come within the *genus* in the first instance. First, take the contract, if it expressly declares what the user is to be there is an end of the matter; but if it is silent on that subject, then for ascertaining the purpose of the letting you can look to parol evidence, or to the inferences to be drawn from the user under the contract, and the nature, district, and equipment of the holding. If this holding is not held to have been let to be used mainly as a dairy farm, it seems to me that henceforward it will only be when the contract furnishes affirmative evidence on the point that a holding can be held to have been so let.

From 1850 to 1885 the use was continuously in the main as a dairy farm. Then the tenant for a number of years during bad times used the place for fattening cattle; but he has since returned to the old user. The district in which the holding lies is notoriously adapted for and devoted to dairying. The equipment of the holding is such as would suit a dairy farm. The cow-house, with accommodation for forty cows is no ruin, and its existence there is only consistent with the place being used as a dairy farm. The parol evidence must be examined with caution, inasmuch as the agent is dead. But the tenant's statement of the discussion between himself and the agent is plentifully corroborated, and no attempt has been made to question its accuracy. Upon the whole, I am of opinion that the lease of the holding was granted and taken on the basis that it was to be used as a dairy farm, and that it has been established by the only mode of proof open in such a case that the holding was let to be used wholly or mainly for a dairy farm.

Appeal.
1900.

CLONCURRY, *Landlord;* HEUSTON, *Tenant.*

HOLMES, L. J. :—

If the words "let to be used wholly or mainly for a dairy farm" imply that there must be an obligation on the tenant to use the holding for this purpose, the landlord ought to succeed in this case. I not only think that no such obligation was imposed or contemplated; but I believe that the landlord did not consider it important from his point of view, whether the tenant fed dry cattle or kept dairy cows. But soon after the passing of the Act of 1881, it was settled that "let to be used wholly or mainly for the purpose of pasture" did not necessarily imply that the tenant was bound so to use the holding. Where such a purpose existed at the time of the letting in the minds of both parties, it was sufficient to exclude the holding from the Act, even although there was neither an express nor an implied contract to this effect.

The purpose could be gathered from the terms of the instrument of letting or proved by other evidence, or inferred from the circumstances of the case, and of the holding.

In the present case I have no doubt that when the lease was being negotiated, it was clearly present to the minds of both landlord and tenant that the purpose of the letting was a dairy farm. It had been previously used, and was equipped for this purpose; the lands in the neighbourhood were similarly used; it was the prudent and profitable mode of farming in the locality; and I am satisfied from the tenant's evidence that the rent was arrived at, and the acreage to be broken up and meadowed was fixed, on this basis.

The Legislature has assumed that there were holdings in Ireland let to be used mainly for dairy farms; but if the present holding is not of the kind thus described, I doubt if one exists at all. I am sure that none nearer the description has ever come within my experience.

Solicitor for the landlord: *K. H. Hallowes.*
Solicitor for the tenant: *D. J. Higgins.*

G. Y. D.

IN THE MATTER OF DANIEL HENRY PETTICREW.

Madden, J.
1900.
June 20, 28.

Landlord and tenant—Land Purchase Acts—Sale of holding by Land Commission on subdivision—Time within which it may take place.

The fact that more than twelve months has elapsed from the death of the proprietor of a holding which has thereby become subdivided, does not prevent the Land Commission requiring it to be sold under sect. 30 (1) (*d*) of the Land Law (Ireland) Act, 1881, and exercising the power of sale under that section.

This case came before Madden, J., under the Local Registration of Title (Ireland) Act, 1891, upon a question referred to him by the Registrar of Titles. The facts and arguments appear fully in the judgment.

Ronan, Q.C., and *D. M'Carthy Mahony*, for the Irish Land Commission.

Madden, J.:— June 28.

The title of the applicant is derived under a sale effected by the Land Commission in exercise of the power vested in them by the 30th section of the Land Law Act of 1881; and the question referred to me by the Registrar of Titles arises upon the construction of that section. By sub-section 1 (*a*), the subdivision of a holding, subject to a purchase annuity, without the consent of the Land Commission, is absolutely prohibited. Sub-section 1 (*b*), enacts that the Land Commission may cause the holding to be sold, whenever a proprietor subdivides in contravention of this statutory provision. The question arises upon sub-section 1 (*d*), which is in the following terms, "Where on the decease of the proprietor the holding would by reason of any devise, bequest, intestacy, or otherwise, become subdivided the Land Commission may require the holding to be sold within twelve months after the death of the proprietor to some one person, and if default is made in selling the same, the Land Commission may cause the same to be sold." In the present case the Land Commission did not require the holding to be sold until more than twelve months had elapsed after the death of the proprietor, on whose decease it had become subdivided; and it is suggested that in such a state of facts the statutory power of sale could not be exercised.

It is unnecessary to refer to the particular circumstances of the present case further than to say that, in my opinion, the period of twelve months should be calculated from the death of the tenant for life of the entire of the holding, under the will of the original purchaser; and that the order of Mr. Commissioner Lynch was a requisition within the meaning of the sub-section. By the action of the Land Commission the parties entitled to the holding have been allowed a longer period than twelve months, not indeed from the date of the requisition, but from the death of the testator which is the *terminus a quo* prescribed by the statute, obviously in analogy to the twelve months allowed by law to an executor for winding up the affairs of his testator. It is not necessary for me to consider whether the statute is mandatory as to the making of this requisition; for a requisition was in fact made. It is not suggested that a reasonable time did not elapse between the requisition and the sale by the Land Commission.

The meaning of the section appears to be that twelve months from the death of the proprietor must in all cases be allowed to the succeeding owners, and a requisition to sell within a shorter time would not satisfy the statute. But I see no reason why the Land Commission should not extend this period, either expressly in the original requisition, or by their conduct, as in the present case. The sale by the Land Commission in default of compliance with the requisition must in every case take place after the expiration of twelve months from the death of the proprietor. Moreover, the statute does not enact that the requisition shall be served within this period; where it is served after the expiration of the twelve months it is of course necessary that a longer time should be allowed for the sale. I see no reason why the Land Commission should not, as against themselves, extend the statutory time allowed to the owners. An opposite conclusion would make the section inoperative in cases where it was plainly intended to apply. Subdivision without consent is prohibited; and it is to be followed by a sale to one owner, either by act of the parties or by exercise of the power of sale vested in the Commissioners by sub-section 1 (*b*). No other state of things is contemplated, and yet if the construction which has been suggested of sub-section 1 (*d*) were adopted, it would only be necessary to conceal from the Land Commission for the space of one year the death of the proprietor who had subdivided his holding by his will; and the subdivision, although avoided by the statute, would be nevertheless indefeasible, inasmuch as the Land Commission would have lost their only remedy—their power of sale. It appears to me that a reasonable construction can be given to sub-section 1 (*d*) in accordance with the remaining provisions of the section. I am of opinion that the Land Commission are in a position to make a good title to the applicant, and that he should be registered as owner of the holding.

Solicitor for the Irish Land Commission: *Alexander*.

W. C. S.

IN THE MATTER OF SECTION 38 OF THE LAND LAW (IRELAND) ACT, 1896, AND PROCEEDS OF THE SALES OF THE HOLDINGS OF JOHN DWYER (1).

Land Com.
1900.
July 27.

Landlord and tenant—Land Purchase Acts—Sale of holding by Land Commission—Liability for dilapidations before purchaser is put into possession.

The Land Commission sold a holding, purchased under the Purchase of Land Acts, on default being made by the tenant in payment of the instalments. Before the purchaser was put into possession the tenant-purchaser committed dilapidations on the holding to a considerable extent:—

Held, that the purchaser had a lien on the purchase money for the difference between the value of the holding when he purchased it and its value after the dilapidations.

ALLOCATION, before Ross, J., sitting for Meredith, J. John Corboy was placed first on the schedule for £138 9*s*. 6*d*. compen-

(1) Before Ross, J.

sation for wilful damage and dilapidation done to premises by the late owner after the date of the sale by the Land Commission to John Corboy.

An objection to this was filed by John H. Madden, submitting that the claim for compensation of Corboy should be disallowed, or reduced to a sum not exceeding £10, which the objector contended would be ample compensation. Madden was a mortgagee of Dwyer who had purchased his holding under the Land Purchase Acts, and who had made default in payment of an instalment of his purchase annuity. The Land Commission had put up the holding for sale on the 11th April, 1900, under section 18 of the Land Law (Ireland) Act, 1887, and Corboy was declared the purchaser. Dwyer refused to give up possession, and by an order of the 5th May, 1900, the Court directed the sheriff to give Corboy possession, which was accordingly done on the 11th May. Between the time of the sale and the time that the purchaser Corboy obtained possession, considerable injury had been done to the holding by Dwyer to the amount of £138 9*s.* 6*d.* as fixed by Mr. O'Meally, Assistant County Surveyor of the county Limerick. The house and out-offices were wrecked; gates and piers removed; and trees and hedges cut down and removed.

Redmond Barry, Q.C., for Corboy, the purchaser:—

The claim for compensation is rightly put at the top of the schedule. Madden, who is Dwyer's mortgagee, cannot be in a better position than Dwyer himself, who would be liable if he were entitled to the proceeds.

C. F. Doyle, for Madden:—

If Corboy is entitled to compensation it should be paid by the Land Commission themselves, and not out of the balance coming to Madden, the mortgagee. The onus lies on Corboy to show that he is entitled to this compensation, just as in the ordinary case of vendor and purchaser; and to establish his claim he must satisfy the Court that the Land Commission was guilty of default. The Land Commission when selling under section 18 of the Land-Law (Ireland) Act of 1887 is in the same position as an ordinary mortgagee; for they are mortgagees selling under a power of sale, and so occupy the position of an ordinary mortgagee. A vendor must be shown to be guilty of acts amounting to wilful default to charge him as trustee for the purchaser: Dart, vol. ii., p. 733 (6th Ed.); *Royal Bristol Permanent Building Society* v. *Bomash* (1); *Clarke* v. *Ramuz* (2); *Earl of Egmont* v. *Smith* (3); *Phillips* v. *Silvester* (4).

Corboy is in a dilemma: if there was no default, no compensation should be awarded: if there was default, it was the default of the vendors, and they should pay the compensation.

Redmond Barry, Q.C., in reply:—

Madden only represents Dwyer, his mortgagor; he claims through him; and he asks the Court to declare in effect that Corboy is to pay Dwyer's creditors.

Ross, J.:—

On the questions involved in this case I have never had any doubt since I heard the facts. The farm was bought by the tenant Dwyer under the Purchase of Land Acts, through the Land Commission. When default was made in payment of the instalment, the machinery of the Act was put into operation; the property was sold, and bought by Corboy. It was injured before he got possession, through no fault of his or of the Land Commission. It appears that the tenant proceeded to wreck the farm, and diminished the value of the property sold to Corboy. The purchaser has a lien on the purchase money for the difference between the value of the property when bought, and its value when injured. The cases cited by Mr. Doyle do not apply. In a vendor and purchaser matter the vendor in possession must doubtless maintain and protect the property; and he is a trustee for the purchaser, and liable for the consequences in case of default; a mortgagee with a power of sale who is guilty of negligence is in no better position. Madden is assignee of the equity of redemption, and is in the same position as Dwyer the mortgagor; and Madden has a remedy over against Dwyer, whatever it may be worth. I am of opinion that the purchaser is entitled to be put

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(1) 35 Ch. D. 390.

(2) [1891] 2 Q. B. 456.

(3) 6 Ch. D. 469.

(4) L. R. 8 Ch. 173.

Land Com. 1900.

In re DWYER.

Ross, J.

on the schedule. As to the amount of the compensation I have no materials with which to assess it. I refer it to Mr. Dames, the Examiner to the Land Commission, to ascertain the amount of compensation to be awarded to Corboy in respect of the injury done to the property between the date of the sale and the date when possession was given. I will give all parties their costs with their respective demands.

Solicitor for the Irish Land Commission: *Alexander.*
Solicitor for Corboy: *John Ryan.*
Solicitor for Madden: *James A. Doyle.*

W. C. S.

M. R. 1901.

Feb. 4.

IN RE JOHN HOGAN, DECEASED;

HOGAN *v.* HOGAN.

(1899. No. 138.)

Intestates' Estates Act, 1890 (53 & 54 *Vict. c.* 29)—*Widow, right of—Marriage settlement executed before Act—Provision in bar of share of husband's estate.*

A provision for a wife in a marriage settlement executed before the passing of the Intestates' Estates Act, 1890, in discharge of all claims by her on the estate and effects of her husband, bars her right to the sum of £500 given by the Act to a widow out of her husband's assets in the event of his dying intestate and without issue, as well as to the share of his assets to which she is entitled under the Statute of Distributions.

FURTHER CONSIDERATION.

This was a proceeding in Chambers, to administer the personal estate of John Hogan, of Enniscorthy, in the county of Wexford. The plaintiff Johanna Hogan, was the widow and administratrix of the deceased, and the defendants Patrick Hogan and Bridget Kelly were two of the next-of-kin.

M. R.
1901.
Hogan
v.
Hogan.

By settlement executed on October 11th, 1886, prior to the marriage of the deceased John Hogan and the plaintiff, then Johanna Sinnott, John Hogan, in consideration of the intended marriage, and of £400 paid to him as the marriage portion of the said Johanna Sinnott, assigned to trustees all the interest and good will in the shop and business of an ironmonger and general hardware merchant, carried on by him at No. 3, Castle-street, Enniscorthy, and all book debts then due or thereafter becoming due to him in respect thereof, and all the shop fixtures and household furniture in the said house in the town of Enniscorthy, upon trust for John Hogan, during his life, and after his death upon trust out of the said house and premises, goods, debts, and household furniture, to raise and levy by sale or otherwise the sum of £500, and to pay over the same to the said Johanna Sinnott, in case she should survive the said John Hogan, in full discharge of all claims by her on the estate or effects of the said John Hogan.

There was no issue of the marriage. John Hogan died intestate on October 20th, 1898, and administration was granted to his widow. The value of the personal estate was about £1900, after deducting debts. On the hearing on further consideration the defendants disputed the right of the plaintiff to any share of the assets of the deceased, whether under the Statute of Distributions or under the Intestates' Estates Act, 1890, by reason of the provision in the settlement, and the question was accordingly argued.

Wakely, *K.C.*, for the plaintiff :—

The words of the settlement are wide enough to bar the plaintiff's share under the Statute of Distributions, but the Intestates' Estates Act, 1890, creates a new right, which is not barred by the settlement. The giving up the right to dower or thirds is a matter of contract between husband and wife; here the parties contracted with reference to the existing state of the law, not with reference to future legislation. He referred to *Lemon* v. *Mark* (1): Roper on Husband and Wife, p. 22.

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(1) [1899] 1 I. R. 442.

M. R.
1901.

HOGAN
v.
HOGAN.

Samuels, K.C., for the defendants :—

The settlement is a bar to any claim under the Statute of Distributions : *Coyne* v. *Duigan* (1), where the words were not so strong. The plaintiff is not entitled to the £500 given by the Act of 1890, which is a provision for a widow "in addition" to her share under the Statute of Distributions. To hold otherwise would be to override the contract between the parties. The Act should not be construed in that way. He referred to Hardcastle on Statutes, p. 372, and *Moon* v. *Durden* (2).

THE MASTER OF THE ROLLS :—

No direct authority on this point has been cited, nor am I aware of any. I have been expecting that a question of this kind would arise, and as I have formed an opinion upon it I had better decide it now. The question is, whether a new right has been conferred upon the widow of an intestate by the Intestates' Estates Act, 1890, and what effect that Act has upon the operation of a marriage settlement made in 1886, by which a provision was made for a wife in bar of any claim by her on her husband's estate. If I thought that the intention of the Legislature was to confer an entirely new right, that is, a right new in kind, I should have little difficulty in holding that the provisions of a settlement such as the present would not have the effect of depriving a widow of the benefit conferred on her by the Act. It appears from the settlement made on the marriage of John Hogan and Johanna Sinnott that she brought in a portion of £400. I attach no importance to this circumstance : the question would be the same whether she had brought in nothing or £1000. The provision for the wife in the settlement is a sum of £500, which is to be raised by the trustees out of the husband's house and premises at Enniscorthy, goods, debts, and household furniture, after his death, and paid over to the wife, in case she survive him, "in full discharge of all claims by her on the estate or effects of said John Hogan."

There is no doubt, having regard to the decisions both in England and in this country, that after the execution of that settlement the widow could not upon her husband's death intestate successfully put forward any claim under the Statute of Distributions to one-half of her husband's personal estate, nor to dower out of his real estate. No question, however, arises here as to dower, as he left no real estate. If the Act of 1890 is to be taken *in pari materia* with the Statute of Distributions, as increasing the rights given to a widow by that statute, and not as giving a generically new right, the same effect must be given to the later as to the earlier statute. Mr. Wakely admits that the clause in the settlement would bar the widow's right under the Statute of Distributions, but not to the £500 given to her by the Act of 1890, that is to say, if he left property worth £1000, she would be entitled to £500, but not to one-half of the remaining £500.

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(1) [1894] 1 I. R. 138.

(2) 2 Ex. 38.

I cannot read the Act in that way. It does not expressly refer to the Statute of Distributions; but it was, I think, intended to be an extension of the rights of the widow under that statute in particular cases. If her husband dies intestate and without issue, and the net value of his real and personal estate does not exceed £500, she is absolutely and exclusively entitled to his real and personal estate. If the net value exceeds £500, she is entitled to £500 absolutely and exclusively, and the rest is to be dealt with as under the Statute of Distributions. Section 4 is very important and is as follows: "The provision for the widow intended to be made by this Act shall be *in addition* and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of £500, in the same way as if such residue had been the whole of such intestate's real and personal estates and the Act had not been passed." That is to say, it is to be a provision *in addition* to what the law gives her, and a provision of the same kind and character as that given to her by the law. This is involved in the words "in addition." The policy of the Act is to increase the provision made by the law for the wife, and to give her more, only in cases where her husband has not made a provision for her in lieu thereof by will, settlement, or otherwise. The words of the settlement are wide enough to include it; it says "all claims by her," not all claims under the law, as it at present exists. Sometimes anomalies arise apart from the statute as well as under it. For instance, a man in poor circumstances makes a small provision for his wife in lieu and in bar of dower and thirds. He becomes rich, and yet it has always been held that the change in his circumstances makes no difference, because it was a matter of contract at the time of marriage. It was to be the measure of what he was to give, and she to take.

For these reasons I am of opinion that the widow is entitled to the £500 under the settlement, but to nothing else. Inasmuch as admittedly she is barred as to the residue, the £500, provided by the statute could not in her case be "in addition" to her distributive share.

Solicitor for the plaintiff: *J. A. Sinnott.*
Solicitor for the defendants: *Martin Huggard.*

W. L.

Appeal.
1900.
Nov. 1, 2, 5, 6, 28.

SHIELDS AND OTHERS Owners; THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, Petitioners (1).

Banker — Bankers' Act — Banker or money-lender — Receipt of money on deposit-receipt—Discount of bills—No cheque-books or current accounts—No issue of notes—Registration of deeds—33 *Geo.* 2, *c.* 14 (*Ir.*).

Down to the year 1879 P. S. carried on business as a banker, or money-lender, in the towns of D., A., and C., in the county of Tyrone, in his own name. He had no other business. After that he carried it on with his son M. S. as P. & M. S. There was not any deed of partnership. In 1890 P. S. conveyed all his property to M. S., who, since that time, was the sole owner of the business. The premises where the business was carried on consisted of two rooms in a house in each of the towns of D., A., and C., one of which was occupied by S., and the other by his clerk. He attended one day in each

(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

week in each of these places. The course of business was this:—Money was lent on promissory notes, payable in twelve weeks, with interest at the rate of ½*d*. in the £1 per week. Advances were also made on mortgages. The firm had been in the habit of receiving large sums of money on deposit, for which they gave promissory notes, payable three months after date. In 1893 they substituted deposit receipts similar in form to those issued by banks, and the amount of money received on these was very large. They also lent small sums, up to £5, without taking any security. They cashed "crop notes" and small American drafts. The books kept by S. were of the most primitive sort, and not such as were usually kept by bankers. S. did not issue notes, cheques, pass-books, letters of credit, or bills on foreign or British banks, and there were not any current accounts kept with the firm. Evidence was given to show that the establishment kept by S. was commonly known as S.'s bank, and the officials of the Bank of Ireland had also called the firm bankers. M. S. obtained advances from the Bank of Ireland, with whom he had deposited by way of equitable mortgage the title deeds of property to secure the advances. These deposits were not accompanied by any memorandum in writing, and were therefore incapable of registration.

By indenture, dated the 14th January, 1899, M. S. conveyed all his property to trustees upon trust to realize and divide the proceeds among his creditors:—

Held (reversing the decision of Ross, J.), that M. S. was a banker within the meaning of 33 Geo. 2, c. 14 (Ir.), and that the mortgages created by deposit of title deeds, not having been registered, were levelled.

APPEAL from the order of Ross, J., dated the 9th July, 1900, disallowing the cause shown against the conditional order for sale. The petition for sale had been presented by the Bank of Ireland, on the 17th October, 1899, on foot of four equitable mortgages, dated the 29th May, 1893, 7th May, 1894, 30th May, 1895, and 6th August, 1898, created by deposit of title deeds by Michael Shields with the bank to secure advances. The lands affected were the lands of Altaglasson in the county of Tyrone. These equitable mortgages were not accompanied by any memorandum in writing, capable of being registered, and so were not registered. At the date of the petition there was due to the bank by Shields the sum of £15,057 15*s*. 11*d*. for principal, together with £893 5*s*. 7*d*. for interest.

On the 14th January, 1899, at a meeting of the creditors of Shields, it was resolved that the bank should be wound up, and

Appeal.
1900.

In re SHIELDS' ESTATE.

that the property should be vested in James Riordan and Francis Shields.

By indenture dated the 14th January, 1899, and made between Michael Shields of the first part, James Riordan and Francis Shields of the second part, the Rev. William Glenn and four others of the third part, and sixty-five persons, creditors of Michael Shields of the fourth part, the said Michael Shields assigned and conveyed all his property, except certain personal chattels, to James Riordan and Francis Shields upon trust to sell and realize and distribute the proceeds among his creditors; and by two later deeds Shields assigned and conveyed all his property to these two trustees for the same purpose.

According to the provisions of the Irish Bankers' Act, 33 Geo. 2, c. 14 (Ir.), the mortgages to the Bank of Ireland were void, unless they were registered, if Shields was a banker, and the sole question in the case was—Was Shields a banker within the meaning of that statute?

In or about 1850, there was in existence at Altmore, in the county of Tyrone, the Altmore Loan Fund, under the control of the Loan Fund Board, pursuant to the provisions of 6 & 7 Vict. c. 91. Patrick Shields was an official in connection with this Loan Fund. It ceased to exist in 1860, but Patrick Shields continued to carry on a similar business, assisted by his son Michael. He carried on business at Dungannon, Cappagh, and Carrickmore, in the county of Tyrone, where he received money on deposit at interest, and employed same in discounting bills and notes, and in making advances in other ways to the public. This constituted his sole business, which he carried on in his own name down to 1879, and, after that, under the name of P. & M. Shields. There was no deed of partnership executed between Patrick and Michael Shields, nor did they ever take accounts between themselves as to profits. Between 1871 and 1886, £32,476 of the money so deposited was invested in the purchase of the lands, the subject-matter of the petition.

By indenture dated the 1st March, 1890, Patrick Shields transferred his interest in the business to Michael, who carried it on in the same manner until the 7th January, 1899, when he stopped payment. At the date of the stoppage, Michael Shields

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1900.

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ESTATE.

owed £122,657 to 1066 depositors. The forms in which the deposit receipt was given was as follows:—

DEPOSIT RECEIPT.

P. & M. SHIELDS, BANKERS,

Altmore, Pomeroy, Tyrone.

1d. stamp

RECEIVED from ______________________________

____

____

____

sterling, bearing interest from this date at £4 per cent. per annum, repayable three months after demand.

Dated this ______________

P. & M. SHIELDS.
Per ______

Signed, ______________

OFFICES: DUNGANNON—Union Lane, every Thursday.
CARRICKMORE—Every Friday.
CAPPAGH—Every Saturday.
HOURS—*From* 11 *a.m. to* 6 *p.m.*

About the 13th May, 1893, Michael Shields opened an account with the Bank of Ireland at Omagh, and, on the occasion of his doing so, R. G. Johnston, the agent of the Bank of Ireland at Omagh, wrote a letter to his principals in Dublin:—

"OMAGH, 8*th May*, 1893.

"MICHAEL SHIELDS.—Overdraft, £12,000.

"DEAR SIR,— . . . Is desirous of opening an account with the Bank, with permission to overdraw to the extent of £12,000. Mr. Shields is a private banker, receiving deposits from and lending money through the country on promissory notes and mortgages. He has, roughly speaking, £25,000 on deposit with him, and has over £40,000 lent in the manner I speak of. . . . The following is a rough calculation of his position:—

£40,000 advanced on promissory notes and mortgages,
£32,700 invested in landed property,
£3000 house property,
£8000 Murphy & Shields, spinners, Lurgan.

"I would most strongly urge the Board to meet Mr. Shields' wishes, as their connection is, by far, the most valuable in this neighbourhood, and his position is beyond all question."

In all proceedings in the Superior Courts, or the County Courts, brought to recover money, the Shields described themselves as bankers, and the letter-paper used in their correspondence

Appeal. 1900.

In re SHIELDS' ESTATE.

was headed, "P. & M. Shields, bankers." They lent money on promissory notes, payable in twelve weeks, at the rate of ½*d.* in the £1 per week, equivalent to about £11 per cent. Advances were also made on mortgages. About 1893 they substituted the deposit receipts for the promissory notes. They also discounted "crop notes," the effect of which was this—In that part of the country what are called trust auctions are customary. A farmer, who in some year does not wish to cultivate all his land, holds an auction in the beginning of the season. The highest bidder gets the use of the land for cropping or meadowing, as the case may be. He pays no ready money, but gives what is called a "Crop Note" or auction bill, which becomes due at the end of the season when he has realised the crop or meadow. A considerable quantity of these notes was discounted by the firm. A separate book was kept for the purpose of containing entries of these notes: it was one of the Loan Society's printed forms. The book had the heading—"Crop Notes," "Loan Society": the two latter words being printed. They also occasionally cashed small American drafts. Upon some occasions they transmitted money to England and Scotland, and to different parts of Ireland by giving cheques on their own account on the Bank of Ireland, in favour of the person who was to receive the money. Upon some few occasions, persons, who had deposit receipts representing money deposited with Shields, received payment from the Bank of Ireland of the amount of the deposit receipt, and the agent of the Bank of Ireland then wrote to Shields, informing him of the payment, and asking him for his cheque to settle the matter. These were nearly all in the same form, and one of them will suffice for illustration—

"BANK OF IRELAND OFFICE,
"OMAGH, *4th May*, 1897.

"DEAR SIR,—I received in Mr. Henry Owens' lodgment to-day a deposit receipt, dated 8th January, 1897, in name of Joseph Conway, senior, £50 of the issue of your Bank, and, if in order, I shall thank you to send me a cheque for the amount. He does not claim the interest, if any.

"Yours faithfully,
"J. B. BURROWS, *Agent.*

"*To* MR. SHIELDS, J.P.,
"Altmore, Pomeroy."

Upon each of these occasions, Shields sent a cheque to the Bank of Ireland to close the matter.

Shields did not issue notes, and he did not issue cheques or give pass-books to his customers. There were not any current accounts of moneys lodged with him. Evidence was given by nine witnesses who were depositors with Shields, comprising farmers, shopkeepers, National School teachers, and publicans, to the effect that they always considered Shields a banker, that his establishment was usually known in the district as "Shields' Bank," and that they frequently went there with drafts in their favour for their salaries, or otherwise, and got them cashed.

On behalf of the Bank of Ireland evidence was given by their agents at Omagh to show that Shields was a money-lender merely, and not a banker. The offices at Union-lane, Dungannon, consisted of two rooms, one occupied by himself, and the other by his clerk; and Patrick Shields, his brother, occupied the room overhead for his office as a solicitor. Shields had no regular office at Pomeroy, but used the office of his brother Patrick Shields the solicitor. The office at Carrickmore consisted of two small rooms in a house, one in the front, and other at the back for a clerk. The principal office was at Cappagh, a small village near Altmore, his residence. It consisted of two rooms in a one-story house: over the door there was a sign-board, "Altmore Loan Fund, A.D. 1852," and the coat-of-arms of the Litton family beside the door on the left. Except this there was no sign-board outside the offices, no plate, or lettering on any window-screen.

They further proved that he did not discount bills, or issue letters of credit, or bills on other places, or transmit money to other places. He had only one clerk, and no other staff; he had no correspondent but the Bank of Ireland, with whom his custom was to draw each week sufficient cash for his requirements, and to lodge his receipts to the credit of his account.

It was further proved that, upon some occasions, he and his assistants levied decrees for debts due to him, without the assistance of the sheriffs; and he occasionally put cattle to graze on the farms of some small farmers who were his debtors.

He made no return as a banker to the Commissioners of stamps and taxes in pursuance of section 22 of 8 & 9 Vict. c. 37;

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nor was the business registered with the Registrar of Joint Stock Companies under 45 & 46 Vict. c. 72, s. 11.

The Bank of Ireland further contended that Michael Shields was a partner in the firm of Murphy & Shields, Linen Manufacturers and Bleachers, 25, Franklin-street, Belfast, until the partnership was dissolved in 1898, and Michael Shields was in the habit of going periodically to Belfast with reference to business. The reply of Michael Shields to this was, that Murphy was his brother-in-law, and that he had invested money in the business, which was managed wholly by Murphy.

Michael Shields had a farm of 126 acres near Altmore, but besides this he did not engage in any business save that of banker or money-lender.

It was further asserted that there were several loan funds in different parts of Ireland, which were always described by the country people as banks, and instances of this were given—the Lisnaskea Loan Fund at Lisnaskea, in the county of Fermanagh; the Loan Fund at Roscrea in Tipperary, managed by one Ely, was commonly known as Ely's Bank; also shopkeepers at Skibbereen and Clonakilty in the county of Cork who did a certain amount of small banking, whose establishments were known as Wolfe's Bank and Bateman's Bank.

Evidence was given by an accountant to show that the books kept were of the most primitive sort. There was no cash-book, and no regular ledger; there was no capital account, no profit and loss account, no account of investments, and no account of the firm showing their lodgments in the Bank of Ireland. There was no account showing American orders or bank drafts cashed by them. The firm invested their moneys largely in the purchase of lands; there was a rent ledger showing moneys received, but no debts; there was a book called the Cash Lent Ledger in which the loans were entered; there was also an Instalment Book; and the depositors' accounts were entered in two ledgers containing four headings—"Interest," "Lodgments," "Paid off," "Remaining Balance."

On the 9th July, 1900, Ross, J., pronounced judgment as follows, holding that Shields was not a banker within the meaning of the Irish Bankers' Act, 33 Geo. 2. c, 14 (Ir.).

Ross, J.:—

This is an application on behalf of the petitioners, the Bank of Ireland, to make absolute the conditional order for sale in this matter notwithstanding the cause shown.

In the years 1893, 1894, and 1896, Michael Shields by way of equitable mortgage deposited with the Bank the title deeds of the lands which are the subject of this petition, to secure overdrafts on his current accounts. The deposit was not accompanied by any memorandum in writing.

Prima facie the petitioners appear to be entitled to the usual absolute order. The owners, Mr. Riordan and Mr. Francis Shields, to whom the previous owner, Michael Shields, conveyed these lands in trust for the benefit of his creditors, contend that Michael Shields was a banker within the meaning of the Irish statute 33 Geo. 2, c. 14, that admittedly no deed has been registered in conformity with the provisions of the statute, that no incumbrance has been created in favour of the petitioners, and that therefore the order ought to be discharged. The petitioners contend that Michael Shields was never a banker within the meaning of the statute, but merely a money lender. On this question everything turns. It has not been disputed that if Michael Shields were a banker, the mortgage, in the events that have happened, would be levelled by virtue of the provisions of the statute. It is obvious that the onus of showing that Michael Shields was a banker rests entirely on the owners.

The business has been carried on under the title of P. and M. Shields. It is material to examine the history of this firm.

[His Lordship stated the facts as already given.]

The volume of business that passed through their hands was very considerable. In the year 1895, Michael Shields had advanced £40,000 or thereabouts on promissory notes and deposit receipts, and at the time when he stopped payment in 1899 he owed 1066 depositors £122,657.

There can be no doubt that of late years the firm called themselves bankers. In legal proceedings in the High Court and County Court they were so designated. In their note-paper, in

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their deposit receipts, and printed notices to customers they call themselves bankers.

I have no doubt that in ordinary conversation the country people spoke of "Shields' Bank." Further, the agent of the petitioners in his letter to the directors describes Michael Shields as a private banker. In the books of the Bank of Ireland he is so described, and sometimes as "Banker." On the other hand it is notorious that money lenders and usurers from the Middle Ages down to the present time have been in the habit of calling themselves bankers. As a class they have always been supposed to be exacting and oppressive, and it is natural that they should adopt the name of a more reputable profession.

I take the opportunity of saying that nothing in the nature of exaction or improper dealing has ever been alleged against this firm. They have always had a high reputation for honesty and fair trading in the county Tyrone. The large sums entrusted to them show how much they enjoyed the confidence of the people in the locality. The regretable disaster that has occurred has not been the result of any dishonesty or recklessness on the part of Mr. Shields. It was caused by circumstances beyond his control, and, when it did occur, he at once made over all he had to trustees for the benefit of his creditors.

It is to be remarked, however, that although there are many affidavits from country people who were their customers, no independent intelligent business man in the county has taken it on himself to swear that he looked upon the firm as bankers, or on their places of business as banks. It is notorious that Loan Fund Societies, which are certainly not banks, are commonly called banks by the country people. I do not over-estimate the fact that Mr. Shields is described in the books of the Bank of Ireland as a banker. Banks and other business houses usually accord to a customer the designation and description he adopts himself. On these facts the question I have now to decide is, whether Michael Shields, at the time when the equitable mortgages were created, was a banker within the meaning of the statute.

I do not think it can assist us much to go minutely into the history of banking. It is a very ancient profession. It existed in ancient Egypt. There were *τράπεζίται* in Greece, deriving their name

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from the *τράπεζα* or table on which the money was counted. There were *argentarii* and *mensarii* in Rome. There were banks in Venice in the time of the Crusades, banks in Florence, largely engaged in business with Edward III. during the French Wars. All these trafficked in money, in some shape or form. Their exact methods of business are not very easy to discover, but it is evident that it varied a great deal in different countries and cities. Coming down to more modern times we find that the Bank of England obtained its charter in 1694, and the Bank of Ireland in 1783.

Having regard to the arguments and the authorities which I am about to deal with, I must refer briefly to the provisions of 8 Geo. 1, c. 14, since repealed. It is described as an Act for the better securing of bankers' notes. In the preamble it is recited that the trade of this kingdom is partly carried on by cash notes given by bankers, to the payment of which their real estates are not liable after their death. For the better securing of such notes it enacts that "where any person or persons doth or shall follow or exercise the trade or calling of a banker, by keeping a public shop, house, or office, for the receipt of the money of such persons as are willing to deposit the same in his or their custody, and doth or shall usually by himself or any person by him or them for that purpose employed, give or issue out promissory notes for the payment of money so deposited on demand, or upon a certain day, etc." If any such bankers shall not pay such notes, then certain consequences are to follow, that are more fully elaborated in the later statute to which I shall next refer. It would seem that this statute was dealing only with banks of issue, but as sections 4 and 5 contain the expression, "any bankers," and not the expression, "such bankers," some Judges have been of opinion that all banks are within its scope.

We now come to the 33 Geo. 2, c. 14, which repealed the statute I have referred to. In its preamble it is recited that the trade and manufactures of the kingdom are in a great measure carried on by promissory notes and accountable receipts given by bankers, and that the credit and currency of their notes will be promoted by giving a more effectual security to the creditors of such bankers than they have at present. It then proceeds to make void conveyances of real estate by bankers, if not registered within a month after execution. In section 8 it enacts that in case a banker stops payment, all his real and personal estate is to be liable to the payment of his debts, without regard to priority, other than debts secured by conveyance registered as aforesaid. No attempt is made to define the term bankers. The word is used without any qualification whatever.

The word banker has neither a legal meaning nor a fixed meaning. "The idea of banking," says Christian, L.J. (1), "in its most developed type, embraces an aggregate of functions, not many of which can be said to be indispensable to the idea in the abstract. The primal element may be said to be the receiving the money of customers on deposit, and paying it out upon their cheques. Upon this came to be superinduced the various methods of making profit by the money while in their hands; the discounting of bills; lending upon securities; issuing those transferable symbols of capital—the cash notes payable to bearer on demand." The question is mainly a question of fact. Was the business that Michael Shields carried on what the ordinary intelligent commercial man would call the trade or business of a banker?

It here becomes necessary to examine the Irish decisions dealing with this statute.

The first, in point of date, is the case of *Stafford* v. *Henry* (2), decided in the year 1849. In that case it appeared that Mr. Labertouche, who carried on the business of a stockbroker, a notary public, and a merchant, in addition thereto carried on, to some extent, the ordinary business of a banker. He received deposits from his customers, paid moneys out again on their cheques. He also discounted and collected bills. It would appear that if this later part of the business had been his sole business, he would have been held to be a banker. But the Court of Equity Exchequer held that he was not a banker, because the banking business carried on by him was merely incidental to his other and principal occupation. The case does not help us very much, because I think it is clear that the principal business of Michael Shields was trafficking in money, borrowing and lending. His farming and his connection with the linen business in Belfast seem to me of little account in comparison with his business as a trafficker in money. But it is of some importance to observe how strongly the Court, and a very powerful Court it was, dwelt upon the fact that the *onus* was cast heavily upon the parties seeking to level the mortgage.

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(1) *Davies* v. *Kennedy*, I. R. 3 Eq. p. 693. (2) 12 Ir. Eq. R. 400.

Shortly afterwards the case of *R. S. Guinness* (1) came before Master Litton. It appeared that Guinness was a land agent on a large scale. At the same time he carried on separately, keeping separate books for the purpose, the business of a banker. He received lodgments on deposit receipts; he paid cheques; he issued letters of credit; he discounted bills; he issued pass-books the same as those used by bankers; his house, which had the appearance of a bank, was open during ordinary banking hours. Master Litton says that he entered on the consideration of the case with the impression that Guinness' business was that of a land agent, because he had judicial knowledge that he had long carried on that business extensively. But what seems to have particularly influenced him was, not merely the fact that eminent merchants and bankers swore that they believed him to be a banker, but that those who swore they did not know him to be such, on cross-examination, when the forms and documents used by him were put into their hands, admitted that if these documents represented real transactions—which they certainly did—they would consider Guinness to be a banker. Master Litton further held that, although Guinness' bank was not a bank of issue, it was a bank within the meaning of the statute. The importance of the case is that it shows how much the question involved is a question of fact, dependent upon the evidence of intelligent men familiar with the ordinary usages of business.

The next case is *Copland* v. *Davies* (2) which came before the Master of the Rolls in 1868. The person concerned was James Birch Kennedy. It appears that in ordinary course of business he received lodgments on deposit receipts, paid the cheques and drafts of his customers, issued letters of credit on English and foreign bankers, charged banker's commission, discounted bills and promissory notes, gave his customers pass and cheque-books; in fact his business in its customary routine, details, and management was similar to that of other bankers; but his bank had not the privilege of issuing notes. The Master of the Rolls held:—1st. That the statute was not impliedly repealed by the subsequent bankruptcy code. 2nd. That the bank, though not a bank of issue, was a bank within the meaning of the statute. 3rd. That an equitable mortgage, accompanied by a memorandum in writing, was levelled by the 8th section of the statute. On appeal the Lord Chancellor agreed with the Master of the Rolls in all these points. Lord Justice Christian expressed no opinion on points 1 and 3; but as to No. 2 he differed from the Lord Chancellor and the Master of the Rolls. He held that the decree ought to be reversed on the ground that the statute did not apply to any bank except a bank of issue.

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(1) 1 Ir. Jur. 359. (2) I. R. 3 Eq. 31; *sub-nomine Davies* v. *Kennedy.*

His view was that the statute of Geo. 1 was confined to banks of issue, that the statute of Geo. 2 in its preamble shows that the intentions of its framers were to supply a more effectual remedy for the same evil as that dealt with by the earlier statute, that the same class of bankers came within its scope, and that, therefore, its operation was to be confined to banks of issue. The result was that the decree of the Master of the Rolls remained in force.

An appeal was taken to the House of Lords, and there Lords Hatherley, Chelmsford, and Westbury agreed with the decision of the Irish Lord Chancellor and Master of the Rolls on all points. As to Lord Justice Christian's views on point 2 they held that, whether the statute of Geo. 1 dealt only with banks of issue or not, the enactments of the later Act were not to be confined to the remedy of the particular evil which seemed to be the principal object of the earlier Act, that its own words must be considered as explaining its objects and the class of persons whom it affects. It was thus settled that the statute was in force affected all bankers, and levelled all incumbrances capable of registration. It is further evident from the judgments of the learned Lords that they were of opinion that whether the incumbrance was capable of registration or not made no difference, inasmuch as the words of the 8th section are sufficient to level all charges that are not in fact registered pursuant to the provisions of the statute. This view appears to be acquiesced in by the counsel for the petitioners in this argument.

The principal contention of counsel for the trustees of Michael Shields resembles very much that put forward by Lord Justice Christian. They insist that the statute of George 2 is not to be taken by itself, that in order to understand it we must go back to the statute of Geo. 1, that the earlier statute contemplates and defines an ordinary bank, and as a species of ordinary bank—a bank of issue, that the decision of the House of Lords has done away with the restriction of the later statute to banks of issue, and that, therefore, the later statute is to be applied to all banks as defined in the earlier statute. The words relied on are:—"Where any person or persons doth or shall follow or exercise the trade or calling of a banker by keeping a public shop, house, or office for the receipt of the money of such persons as are willing to deposit the same in his or their custody, and doth, &c., issue promissory notes." They say that Michael Shields kept a public shop or office for the receipt of the money of such persons as were willing to deposit the same in his custody, and that therefore his establishment, though not a bank of issue, was a bank as defined by the earlier statute, and that therefore it is a bank within the meaning of the later statute.

This is the very error, if one may say so, with deep respect to so great a name, that permeated the judgment of Christian, L.J. The whole of the earlier statute is cleared off the statute book; the definition or description is not repeated in the later statute at all. Its own words must therefore be looked to, and its own words only. Assuming that the earlier statute defined banks of issue, and banks other than those of issue, it is a fallacy to conclude that the second class, as defined in the earlier statute, is the same class exactly as that to which the later statute is to be applied. The class may be more comprehensive even than the class as originally described, or it may be restricted. The argument is in conflict with *Stafford* v. *Henry* (1), as Labertouche would be a banker within the definition. If the argument is right the conduct of *Guinness' Case* (2) before Master Litton was unnecessary. Why was it necessary to examine so many bankers and commercial men, to inquire into his method of keeping books, his documents, his pass-books, &c., when it was clear from the first that he kept a public shop for the receipt of depositors' money?

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(1) 12 Ir. Eq. R. 400. (2) 1 Ir. Jur. 359.

The trustees of Michael Shields further contend that except in one particular, namely, receiving money and paying its equivalent in cheques, the other elements of a banker's business existed in the trade of the firm. They received money on deposit receipts resembling those used by bankers. They lent money on promissory notes. They discounted bills and notes to some extent. The business, it is submitted, was not carried on in a commercial centre, but in an inland county they did a share of what banking business there was to do among the farmers who inhabit the district. Their business was not like that of the ordinary money lender, who trades not with borrowed money, but with his own money. They called themselves bankers, were called so by the country people, and are entered on the very books of the petitioners themselves as such. Are they to be declared not to be bankers because they kept no current accounts? All this sounds very plausible, but notwithstanding I am of opinion that they were not bankers.

I have already sufficiently commented on the weakness of the argument that they held themselves out as bankers. As to the discounting of bills and notes, I think it was not carried on to any great extent, except in the case of crop notes. We hear of none of the considerable business houses in Dungannon and Omagh discounting their notes with this firm. As to their trading with money, that by itself is not banking, though it is part of a banker's business. What seems to be overwhelming against their contention is the fact that in their business what is the primal element in banking, in the opinion of Christian, L.J., is wanting, namely, the paying out money on cheques. The relation of banker and customer is that of debtor and creditor, not trustee or *quasi* trustee. But, superadded to that simple relationship, there has been thrown upon the banker the duty of paying cheques drawn upon the bank so long as there are funds to meet them. This is part of the understanding between the parties which is so old and so universal that the law recognises it as an implied term in the contract, or as a duty cast on the banker for the breach of which an action will lie. The importance of this element is dwelt upon by Turner, L.J., in *Ex parte Coe* (1) where he deals with the branch of the Company's business that had most resemblance to banking; he says it differed most materially from the ordinary "business of a bank," for the Company did not honour cheques payable on demand and drawn upon themselves. This element of the business is to the ordinary mind the primal—the most notorious and the best understood—of all the services the banker renders to society, and it is hard to imagine how the ordinary commercial man could look on any establishment as a bank where current accounts, pass-books, and cheque-books are unknown.

Another thing that weighs very heavily against the trustees' contention is the way in which the books were kept. This is not merely a matter of degree, it is a matter of substance. Would any jury of commercial men think that these were the books of a banker, or that any bank could be carried on with books kept in such a way?

Another matter and one of some importance, is the fact that the firm never registered itself as a bank. I do not mean in anything I have said, to lay down as a matter of law that there is any one essential element, the absence of which prevents a business firm being a bank. I am of opinion, on the whole case, weighing the matters in which the firm's business resembled a banker's business against the matters in which it did not, that this was not a bank, and that the trustees have failed to establish the fact that would destroy the petitioners' security. The petitioners' conditional order must, therefore, be made absolute with costs out of the property conveyed and assigned by Michael Shields.

W. C. S.

From this judgment J. Riordan and F. Shields, the trustees under the deed of the 14th January, 1899, appealed.

Henry, Q.C., and *Patchell*, for the appellants:—

The Shields were bankers within the meaning of 33 Geo. 2, c. 14 (Ir.), They transacted every kind of business usually done by a bank of non-issue, except keeping current accounts and issuing cheques. Money was lent on promissory notes, payable in twelve weeks; advances were made on mortgage; money to a large amount—over £120,000—was received on deposit; the firm discounted "crop notes" or auction bills; small sums were lent without any security, American drafts were cashed, and they were called "bankers" in the locality. They were not within the Loan Fund Act, 5 & 6 Wm. 4, c. 23: there was no provision made for deposits. They conducted their business in the open market without any of the restrictions imposed on savings banks, who can only lend to Government. The affidavits of the bank managers are not evidence: they amount simply to an expression of opinion, and they do not state any facts. The manager of the Bank of Ireland at Omagh, called them bankers in his letters. The affidavit of the accountant, who examined the Shields' books, stated that they were money-lenders, and not bankers. But that is leaving out one side of the account, because the Shields got the money they lent out from the depositors, taking it in at a lower rate of interest than that at which they lent it out.

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(1) 3 De Gex F. & J. 338.

The first Act dealing with bankers in Ireland is 8 Anne, c. 11, which dealt with bills and notes, and made them assignable at law. Then came 8 Geo. 1, c. 14, which made a banker's real estate liable for payment of debts, and this Act contained a definition of banker as a person who shall follow or exercise the trade or calling of a banker by keeping a public shop, house, or office for the receipt of the money of such persons as are willing to deposit the same in his custody and give promissory notes for payment of such money on demand or on a certain day. This Act was repealed by 33 Geo. 2, c. 14, which was passed, as stated by Lord Clare in *Hayden* v. *Carroll* (1), in consequence of the failure of Malone's bank. It contains no definition of "banker," but being *in pari materia* we submit that the definition should be implied. Sect. 8 extends to all debts of a banker, and not merely to such as are contracted in his business of a banker only: *Hayden* v. *Carroll* (1). If a man has any other business, to which banking is merely subsidiary, he is not within the Act: *Stafford* v. *Henry* (2). But the Act applied to banks of non-issue as well as

(1) 3 Ridg. 545. (2) 12 Ir. Eq. R. 400.

to banks of issue: *Re R. S. Guinness* (1). This was challenged in *Davies* v. *Kennedy* (2), but it was finally settled in that case in the House of Lords that it applied to both: *sub nomine Copland* v. *Davies* (3). But the large volume of the business transacted by the Shields, consisted of the amount taken in on deposit receipt; and the receipt of money by the banker for the purpose of making a profit out of it, was the earliest business of the banker: *Ex parte Wilson* (4).

T. Pakenham Law, Q.C., *Ronan, Q.C.*, and *Jonathan Pim*, for the Bank of Ireland :—

We contend that Shields was a money-lender, and not a banker. Lodging money on deposit receipt does not constitute the relation of banker and customer. The relation of banker and customer is that of debtor and creditor; and once the money is deposited or paid into the bank, it ceases to be the money of the customer, and becomes that of the banker: *Foley* v. *Hill* (5). The system of lodging money on deposit receipts has only come into existence so extensively within the last thirty or forty years. See the observations of Cockburn, C.J., in *Goodwin* v. *Robarts* (6). Deposit receipts are not negotiable: *Moore* v. *Ulster Bank* (7). In *De Robeck* v. *Cloncurry* (8), it was held that a sum of money in the hands of a salesmaster, did not pass under a bequest of "all cash balances standing to my current account or on deposit account with any of my bankers," though the testator's account was entered in the salesmaster's ledger, and he sometimes got money in cash or by cheque. But it is the receipt of a customer's money, with the superadded obligation, arising out of the custom of bankers, to honour the customer's drafts, that constitutes the relation of banker and customer: *Ex parte Coe* (9). The person who receives deposits and discounts bills is a bill-discounter or a bill-broker, and not a banker: *Overend, Gurney & Co.* v. *Gurney* (10). A banker is bound to honour cheques: lodgment on deposit receipt is on a special contract, and is not part of the custom of bankers. The contract excludes the custom of bankers. No one has ever yet been held to be a banker who did not keep current accounts.

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(1) 1 Ir. Jur. 359.
(2) I. R. 2 Eq. 668.
(3) L. R. 5 H. L. 358.
(4) 1 Atk. 217.
(5) 2 H. L. Cas. 28.
(6) L. R. 10 Ex. 337, 351.
(7) I. R. 11 C. L. 512.
(8) I. R. 5 Eq. 588.
(9) 3 De G. F. & J. 335.
(10) L. R. 4 Ch. 701; L. R. 5 H. L. 480.

Another test of what constitutes a banker is—Did Shields keep books of account, such as a banker should? From the evidence of the accountant it is clear that his books were such as a local money-lender would have, and also that he could not possibly have kept a large business going by such a primitive kind of book-keeping.

Another test as to what is a banker is—Does he issue letters of credit, and provide for his customers the command of money in other places, or in other countries? It is not pretended that the Shields did.

Again, no person was held to be a banker, unless he had an establishment open for the transaction of business with customers. Having an office open one day in the week is not sufficient. It is true that a bank sometimes opens an office on the occasion of a fair or a market; but that is always treated as a sub-office, of which the accounts are kept at the office of which it is a branch, where the customer may draw money any day. The fact that the country people in the locality called Shields' establishment a bank is not evidence; it is a mere convenience of speech; there is proof here that a number of shops and loan offices in Ireland are locally known as banks.

So far as joint-stock banks, established under 6 Geo. 4, c. 42, are concerned, the 33 Geo. 2, c. 14 is repealed by 8 & 9 Vict. c. 37: *O'Flaherty* v. *M'Dowell* (1).

Nov. 28.

LORD ASHBOURNE, C.:—

This is an appeal from an order of Mr. Justice Ross on an application on behalf of the petitioners, the Bank of Ireland, to make absolute the conditional order for sale in this matter notwithstanding the cause shown.

The judgment of Mr. Justice Ross contains a very clear statement of the facts of the case. It appears that Michael Shields deposited, by way of equitable mortgage and without any writing, in the years 1893, 1894, 1895, and 1898, with the bank, the title deeds of the lands which are the subject of this petition, to secure over-drafts on his current accounts.

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(1) 6 H. L. Cas. 142.

The petitioners claim that they are entitled to an absolute order for sale. The owners, to whom Michael Shields conveyed these lands in trust for the benefit of his creditors, on the other hand contend that Michael Shields was a banker, within the meaning of the Irish Statute 33 Geo. 2, c. 14, that admittedly no deed has been registered in conformity with the provisions of the statute, that no incumbrance has been created in favour of the petitioners, and that therefore the order ought to be discharged. The petitioners urge in reply that Michael Shields was never a banker within the meaning of the statute, but merely a money-lender. If Michael Shields was a banker, the mortgage would be levelled by virtue of the provisions of the statute. The question for decision is—Was Michael Shields a banker within the meaning of 33 Geo. 2, c. 14 (Ireland).

The history of this firm of P. and M. Shields is tolerably clear, and is set out in detail by Mr. Justice Ross. They carried on their business in modest premises in Dungannon, Altmore, or Cappagh, and Carrickmore. Up to 1879, Michael Shields carried on the business in his own name, but after that it was carried on in the name of P. and M. Shields. There was never any deed of partnership. In 1890, Patrick Shields conveyed all his property to Michael Shields, who has since been the sole owner of the business.

Money was lent on promissory notes payable in twelve weeks at the rate of ½*d.* in the pound per week, *i.e.* about 11 per cent. Advances were also made on mortgages. The firm had been in the habit of receiving large quantities of money for which they formerly gave promissory notes payable three months after date. In the year 1893 they began to substitute for the promissory notes, deposit receipts, resembling very much those issued by banks. [His Lordship read the contents of one of the deposit receipts, *ante*, p. 176]. What are known as crop-notes were largely discounted by the firm, who kept a separate book for the purpose. The firm also lent small sums from £1 to £5 without taking any security. These transactions were entered in the "Cash Lent Ledger." The firm occasionally cashed small American drafts.

Mr. Justice Ross states their dealings with the Bank of Ireland as follows:—"Sometimes he gave his cheque on the Bank of Ireland to a customer, who had no bank account of his own, and was desirous of sending the money to a distance. On three or four occasions one of the firm's deposit receipts was lodged with the Bank of Ireland. On hearing from the Bank manager to that effect Mr. Shields sent him a cheque in the manager's name for the amount."

It is conceded that no customers kept current accounts with the firm, who did not issue cheque-books or pass-books, or letters of credit or bills on foreign or British banks. The books of the firm were admittedly not kept with that fulness or precision which any bank of to-day would insist on. The firm manifestly did a very considerable amount of banking business: and when it stopped payment in 1899 it owed 1066 depositors £122,657. In the year 1895 it had advanced £40,000 on promissory notes and deposit receipts. Although the firm was not registered as bankers, they unquestionably called themselves bankers. On their stationery, and in the deposit receipts and printed notices to customers, they uniformly so described themselves: while in all legal proceedings they were thus designated. It is also important to note that Mr. Shields is described in the books of the Bank of Ireland as a banker. The letter of Mr. Johnston, their agent at Omagh, is entitled to great weight, because it indicates unmistakably how their trained and experienced officials, before any litigation had occurred, deliberately described the firm. [His Lordship read the letter, dated the 8th May, 1893, from R. G. Johnston, *ante*, p. 175]. I regard this letter as in many ways stronger and more satisfactory than an affidavit sworn for the purpose of the litigation. It is entitled to great weight in considering the question whether Michael Shields at the time when the equitable mortgages were created, was a banker within the meaning of the statute 33 Geo. 2, c. 14 (Ireland).

That Act was preceded by the 8 Geo. 1, c. 14, which was an Act for the better securing of bankers' notes. In the preamble it is recited that the trade of this kingdom is partly carried on by cash notes given by bankers, to the payment of which their real estates are not liable after their death. For the better securing of such notes it enacts that "where any person or persons doth or shall follow the trade and calling of a banker by keeping a public shop, house, or office, for the receipt of the money of such persons as are willing to deposit the same in his or their custody, and doth or shall usually and by himself or any person by him or them for that purpose employed, give or issue out promissory notes for the payment of the money so deposited on demand, or upon any certain day," then if such notes are not paid, the consequences therein mentioned are to result.

The Act 33 Geo. 2, c. 14, repealed the statute I have referred to; and recites in its preamble that the trade and manufacture of the kingdom are in a great measure carried on by promissory notes and accountable receipts, given by bankers, and that the credit and currency of their notes will be promoted by giving more effectual securities to the creditors of such bankers than they have at present. It makes void conveyance of real estate by bankers if not registered within a month after execution; and in section 8 it enacts that in case a banker stops payment all his real and personal estate is to be liable to the payment of his debts without regard to priority other than debts secured by conveyance registered as aforesaid.

The word "Banker" is used without qualification in a general sense, and it has no technical meaning. It is a question to be answered according to the facts of the case. Dr. Johnson's definition is, that a banker is one that traffics in money, one that keeps or manages a bank, but this gives no great help.

The authorities bearing on the subject are not very numerous, but they are interesting. The case of *Hayden* v. *Carroll* (1) attracts attention from its being a decision of the Irish House of Lords, and from the judgment of Lord Clare, but it does not much assist us.

The case of *Stafford* v. *Henry* (2) decided in the year 1850, is noteworthy from the grounds of decision. In that case it appears that Labertouche, who carried on the business of a stockbroker, a notary public, and a merchant, in addition thereto carried on to some extent the ordinary business of a banker. He received

(1) 3 Ridg. P. C. 545.

(2) 12 Ir. Eq. R. 400.

deposits from his customers, and paid money out again on their cheques; he discounted and collected bills. If this latter part of the business had been his sole business he would have been held to be a banker, but the Court of Equity Exchequer held that he was not a banker, because the banking business carried on by him was merely incidental to his other and principal occupation. This case has no strong bearing, because it is clear that the principal business of Michael Shields was trafficking in money, borrowing and lending.

Not long after, the case of *R. S. Guinness* (1) came before Master Litton. Guinness was a considerable land agent. At the same time he carried on separately—keeping separate books for the purpose—the business of a banker. He received lodgments on deposit receipts; he paid cheques; he issued letters of credit; he discounted bills; he issued pass-books—the same as those used by bankers, and his house which had the appearance of a bank was open during ordinary banking hours. Master Litton held that although Guinness' bank was not a bank of issue, it was a bank within the meaning of the statute.

The next case is *In re Kennedy* (2), which came before Judge Dobbs in 1867. The person concerned was James Birch Kennedy. It appears that in ordinary course of business he received lodgments on deposit receipts, paid the cheques and drafts of his customers, issued letters of credit on English and foreign bankers, charged bankers' commission, discounted bills and promissory notes, gave his customers pass and cheque books; in fact his business in its customary routine, details, and management, was similar to that of other bankers. But his bank had not the privilege of issuing notes. Judge Dobbs held that the statute was not impliedly repealed by the subsequent bankruptcy code; that the bank, though not of issue, was a bank within the meaning of the statute, and that an equitable mortgage accompanied by a memorandum in writing was levelled by the 8th section of the statute. The case came before the Master of the Rolls under the name of *Davies* v. *Kennedy* (3), and he agreed with Dobbs, J

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(1) 1 Ir. Jur. 359.

(2) I. R. 1 Eq. 31.

(3) I. R. 3 Eq. 33.

The Master of the Rolls was himself affirmed in the Court of Appeal here: *diss.* Christian, L.J. (1).

An appeal was taken to the House of Lords, and there Lord Hatherley, Lord Chelmsford, and Lord Westbury agreed with the decision of the Irish Lord Chancellor and Master of the Rolls on all points. The judgment of Lord Hatherley is much in point. It was thus settled that the statute was in force—affected all bankers—and levelled all incumbrances capable of registration.

The Act of Geo. 1 contemplates apparently a bank of issue; and it is urged that the decision of the House of Lords has done away with the restriction of the later statute to banks of issue, and that therefore the later statute may be applied to banks as defined in the earlier statute; but it is wiser to treat the whole of the earlier statute as removed from the statute book, and to concentrate attention mainly upon the words of the later enactment.

The trustees of Michael Shields insist that except in one particular, namely, receiving money and paying its equivalent in cheques, the other elements of a banker's business existed in the trade of the firm. They received money on deposit receipts resembling those used by bankers; they lent money on promissory notes; they discounted bills and notes to some extent; they did a fair share of what banking business there was to do among the farmers who lived in the district. They called themselve bankers, were called so by the customers, and are entered on the very books of the petitioners themselves as such. Are they to be declared not to be bankers, because they kept no current accounts? This is the main contention of the respondents.

The Bank of Ireland urge that the primal element in banking is the paying out money on cheques. This might be urged possibly now with some plausibility, but I do not think it could be so argued at the date of the passing of 33 George 2, c. 14. The Bank of Ireland had not then been founded. Cheques were not at all as common then as now. Printed cheques were not then general. We have been shown, as novelties, some of Childs' Bank of 1762, and of the Bank of Ireland dated 1802. We must remember the mischief against which 33 Geo. 2, c. 14, was directed. We must consider what banks were then, and I do not think that at that date a bank which performed the other duties of a bank, but which did not pay cheques, would be the less regarded as a bank. Section 15 of 33 Geo. 2, c. 14, is important. [His Lordship read sect. 15 of the Act of Parliament.]

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(1) I. R. 3 Eq. 668.

It will be at once noted that there is no penalty for keeping a bank which received money and paid it out on cheques, going to show that the other kinds of banking business were then more prominent in the minds of its framers, and that it was only deemed necessary to guard against those which it expressly named. The case of *Ex parte Coe* (1), has been relied on by the bank, but it is quite distinguishable. The marginal note sufficiently states the facts.

"A company called the 'District Savings Bank' was registered in 1858 under the Joint Stock Companies Act, 1856, with limited liability, but was never registered under the Acts of 1857 and 1858, relating to Banking Companies, and its shares were of £1 each. Its objects were to receive deposits, to grant loans on security, and to conduct the business of emigration agents. Money could not be drawn out by cheques, payable on demand, but only be withdrawn after notice, and the Company kept banking accounts with two banks in London:—*Held*, that it was not a banking Company within the meaning of the Acts relating to such Companies, and that the Court of Chancery had no jurisdiction to make an order for winding it up."

The evidence showed that the course of business in the Savings Bank department was to receive deposits and allow the depositors interest upon them, and that the deposits could not be withdrawn without seven days' notice; that in the Investment Department, in which larger sums were received, the sums deposited might be withdrawn on notice, the length of notice varying according to the amount deposited. No cheques, payable on demand, could be drawn upon the Company. The Company kept a banking account with the Bank of England, and also with a joint stock bank.

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(1) 3 De G. F. & J. 335.

The Court of Appeal in Chancery in England, consisting of Lord Justice Knight Bruce and Lord Justice Turner, decided that it was not a banking Company within the meaning of the Acts relating to such Companies. That decision has been relied on here as applicable to this case, and it was urged that we should follow it, and hold that Shields was not a banker. The case is distinguishable in its facts. If a man carries on other business besides that of banking, and if the banking is only subsidiary to the other business, he cannot be regarded as a banker. In that case other business was carried on, and the report of the case in the Law Journal (vol. 31 (N. S.), p. 8, Bankruptcy) shows that bank work formed only a very moderate part of the business.

I find, as a result of the facts of the case, that the Shields firm borrowed the money at issue as a bank from the Bank of Ireland; that the Bank of Ireland lent the money to the firm as to a bank; that the Bank of Ireland, uniformly in their books, called the firm a Bank; that the main business of the firm was banking, and that it would not lose the position and character of a bank, because it did not perform all the functions now performed by banks. In my opinion it was a bank within the meaning of 33 Geo. 2, c. 14 (Ireland), and, therefore, I think that the appeal should be allowed with costs.

Fitz Gibbon, L.J.:—

I concur. From the commencement, I have seen no reason to doubt the conclusion at which we ought to arrive. First, let us consider the question apart from the Bankers' Acts. Was the dealing between Shields and the Bank of Ireland a dealing with "a banker," according to the understanding of the parties? Of that there can be no doubt. In all his dealings with the public, Shields held his firm out as "Bankers." He so described himself for the purpose of inducing custom and giving dignity to his operations. It may be conceded that people who are not bankers, cannot make themselves so by adopting the name. Pawnbrokers, money lenders, or others, sometimes call themselves bankers, though they do not "follow or exercise the trade, business, or calling of a banker" at all. But the name was assumed by Shields, and the Bank of Ireland accepted it as a truthful designation. As a banker he applied to the local manager for pecuniary assistance. His application was recommended to the directors, because he was a banker; as such they accepted him as a customer; they described him in their books as a banker; and from beginning to end they treated him as a banker. That being so, it is only a question of fact, and one upon which the presumption is in the affirmative, whether there is reasonable evidence to warrant the conclusion that Shields was what he professed to be, and what the Bank of Ireland took him to be, namely—a "Banker"? For the ordinary meaning of the word "Banker," I look to what was the latest authority when the Act of 1759 passed. Dr. Johnson defines "Bank" as "a place where money is laid up to be called for occasionally"; *i.e.* as occasion may require, and as the terms of deposit may permit. "Banker" is "one that traffics in money; one that keeps or manages a bank"; and "to bank" is "to lay up money in a bank." What is the essence of banking? The business of banking, from the banker's point of view, is to traffic with the money of others, for the purpose of making profit. But from the customer's point of view, he is a banker *ab initio* from the moment of receiving the money into his bank; and, in my opinion, the essence of the trade, business, or calling of a banker, is not primarily or essentially to be found in the mode in which he disposes of the money which is deposited with him, but in the mode in which he receives the money of others. If he keeps open shop for the receipt of money from all who choose to deposit it with him; if his business is to trade for profit in money deposited with him for that purpose, he answers the description of a "Banker"; and neither he, nor anyone who deals with him under that name, can deny that he is a "Banker." It is said that because Shields did not issue cheque-books, and did not honour drafts on demand, he could not be a banker. If a banker's business was confined to honouring cheques on demand, he could not make any profit at all; those who take money "on deposit account" are just as much bankers as those who hold it "on current account." Most bankers do both, and the deposit department is often both the largest and the most profitable branch of the banker's business.

Being a "Banker" apart from the Act, was Shields within the mischief to which the Act of 1759 was addressed? That Act extended the "Act for the better securing of the payment of bankers' notes" of 1721, to "providing a more effectual remedy for the security and payment of debts due by bankers" in general, and it applies to all bankers.

The mischief consisted in bankers receiving other people's money, and then alienating their property, or giving security to one person or creditor in preference or priority to others, by secret dispositions. The mischief arose from the receipt of money by bankers; the remedy was intended for the benefit of the depositors; and the banker's mode of trading with the money afterwards was a secondary matter. Such a case as that of Labertouche (1), is easily understood. He carried on several classes of business, stock-broking, agency, and money-broking, including some banking business. It was held that banking was not his chief business, but was only ancillary to it, and, therefore, that he was not a banker.

But the only business which Shields carried on, so far as it went, was that of a banker. He did not carry on banking in all its branches, but everything which he did was banking. He received money on deposit, from all who were willing to lay it up in his bank, and he traded with that money for his own profit. It was suggested that he was only "a *gombeen* man." But lending money on "scraps of paper," which is, I believe, what *gombeen* means, is about the most important part of a banker's business. Discounting bills, lending on notes, and the like, are all only so many modes of trading in money profitably, by lending it out at larger interest than the banker pays for it. The size of his business raised Shields from the level of "a gombeen man" to that of a banker, for, at his failure, he had over £100,000 on deposit, for which his firm had given receipts as bankers, and though the Bank of Ireland might regard this as a trifling sum, it was large enough to show a respectable amount of banking business for a private firm.

It was contended that the Shields were not bankers "within the meaning of the statute," as if the statute used the word in some technical or non-natural sense. There is nothing technical in the meaning of "banker" in the statute, as distinguished from any other use of the word. The *argumentum ad hominem* precludes the Bank of Ireland and Shields himself from denying the title to him: his business was banking on a considerable scale.

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(1) *Stafford* v. *Henry*, 12 Ir. Eq. R. 400.

There has been no change in the meaning of the *word* since 1759; the only change has been in the way in which the business of bankers is carried on. Like many other things, the business has developed and grown. Stage coaches are different now from what they were in the reign of George II.; but so far as statutes dealing with stage coaches are still unrepealed, they are applicable to any stage coaches that may still survive. The Shields were old-fashioned bankers, and the old-fashioned Act is all the more applicable to them on that account. The evidence goes far to show that it was largely owing to the old-fashioned way in which they carried on their business that they were driven out of the market, and ultimately found their way to the *limbo* of all antiquated things. But their very old-fashionedness only brings them within the mischief of the Act of 1759, and it is remarkable how much more like their business was, even in its defects, to that of the private bankers described in 33 Geo. 2, c. 4, than it was to the business of the Bank of Ireland of the present day. The Bank of Ireland ought to have known, when dealing with private bankers, that the law provided special safe-guards for those who deposited their money with such people, and they have only themselves to blame for having overlooked the law.

The bank's security being void as an incumbrance, the cause shown against the conditional order for sale of the lands sought to be sold, must be allowed, and the petition for sale dismissed. The Bank of Ireland must come in on equal terms with the other creditors, for whom the appellants are trustees.

WALKER, L.J.:—

The question in this case is whether Michael Shields was a banker within the meaning of the 33 Geo. 2, c. 14 (Ireland). If he was, the security given by him to the Bank of Ireland for advances, by deposits of title deeds of real estate, the first of which is dated the 29th May, 1893, and the last 6th August, 1898, is levelled. There is due to the Bank for principal £15,057 15*s.* 11*d.*, and for interest £893 5*s.* 7*d.* to September, 1899.

It is material, in the first place to see what business, confessedly part of a banker's business, Shields carried on, and what branches of a banker's business, as most usually practised, he did not include in his business.

Patrick Shields, the predecessor in business of Michael, had traded as the Altmore Loan Fund from 1852 to 1860. From that time he carried on business under the name of Banker; his trading was confined to county Tyrone, and it was carried on in offices in three places open to the public; Dungannon, every Thursday; Cappagh, Saturday; and Carrickmore, every Friday. The hours of business were from 11 to 6. He received money on deposit from farmers and others, for which he gave deposit receipts, and he also lent money for which he obtained promissory notes. He employed the moneys he had on deposit in making loans on these notes at higher rates of interest than he himself gave.

Patrick Shields in 1879 took in Michael Shields as partner, and from that period they traded as P. & M. Shields, Bankers. Their place of business was called and known as Shields' Bank. By a deed of 1st March, 1890, Patrick transferred his business to Michael, who thence carried on business in the same way until he stopped payment on 7th January, 1899.

The promissory notes taken were at twelve weeks, bearing interest at one halfpenny in the £1 per week, equal to 11 per cent. The forms of deposit receipt given for money deposited were—

No.

Name,

Address,

Amount, £

Dated day of

OFFICES: DUNGANNON—Union Lane, every Thursday.
CARRICKMORE—Every Friday.
CAPPAGH—Every Saturday.
HOURS—*from* 11 *a.m. to* 6 *p.m.*

DEPOSIT RECEIPT.
P. & M. SHIELDS, BANKERS,
Altmore, Pomeroy, Tyrone.
[*Stamp.*]

RECEIVED from

sterling, bearing interest from this date at £4 per cent. per annum, repayable three months after demand.

Dated this

P. & M. SHIELDS.
Signed, *Per*

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No.

Name,

Address,

Amount, £

Dated day of

DEPOSIT RECEIPT.

P. & M. SHIELDS, BANKERS,
Altmore, Pomeroy, Tyrone.

[*Stamp.*]

RECEIVED from

sterling, as a fixed deposit, bearing interest at the rate of £4 per cent. per annum. Three months' notice previous to withdrawal to be given by depositor. Interest payable yearly on 31st December in each year.

Dated this day of 189

Signed,

£ : :

Public notices, from time to time, were issued in relation to the banking business as follows:—

P. & M. SHIELDS, BANKERS,
Altmore, Pomeroy, Tyrone.

OFFICES:

DUNGANNON, Union Lane, every Thursday; CARRICKMORE—Every Friday; CAPPAGH—Every Saturday.

From 11 *a.m. to* 6 *p.m.*

BANK NOTICE.

The undersigned beg to intimate to their customers (borrowers and depositors), to the public generally, that in future they will attend for the transaction of business between the hours of 11 o'clock a.m., and 5 p.m., in—

DUNGANNON, every Thursday.
CARRICKMORE, every Friday; and
CAPPAGH, every Saturday.

After the 30th of this month (July, 1890), their weekly attendance at ROCK will be discontinued.

They desire also to intimate that after the 31st of December next, they will give no higher interest than £4 per cent. per annum on deposits.

Dated at Altmore this 15th July, 1890.

P. & M. SHIELDS.

It was also part of their business occasionally to cash for farmers what were called "crop notes," for which they received a small commission, and also American and other foreign orders, and they occasionally transmitted money for customers by means of their own cheque. At the date of his stoppage Michael Shields owed a sum of £107,254 12*s.* 5*d.* on foot of deposit receipts issued, held by 1065 depositors, and he held promissory notes of borrowers for £47,000. His bank was well known throughout Tyrone as Shields' Bank, and in all legal proceedings and in correspondence they had been called Bankers. On the other hand, Michael Shields did not issue notes, and his customers did not lodge money to a current account or draw on him by cheques, and he did not give cheque-books to customers or keep pass-books with them; he did not collect bills or issue letters of credit. He had an account with his own bankers, who from 1893 were the Bank of Ireland, and each week he drew sufficient cash to meet his requirements; the books which he kept were not in the form usually adopted by bankers, but they contained materials which showed the deposits issued and the payments made, and the amounts due, and the promissory notes held, and payments made, and sums due. The deposit receipts issued were not in form negotiable.

It is too late to contend since the decision of the House of Lords in *Copland* v. *Davies* (1) that the fact of Shields not issuing notes prevented the application of the 33 Geo. 2, c. 14, and this was not argued.

It was, however, contended that the fact of the deposit receipts not being negotiable, excluded him from the Act, but this contention also is opposed to the views of the Peers in *Copland* v. *Davies* (1). Lord Chelmsford distinguishes between the 2nd section and 4th and 5th in this connection, and says:—"The 4th and 5th sections show that the Act applies to other bankers than those described in the preamble, for they relate to bankers giving any note, negotiable receipt *or* accountable receipt, thereby clearly distinguishing between receipts that are negotiable and those which are mere matter of account with the customer. This distinction having been made, the 15th section, which speaks of any person giving any note or accountable receipt as banker, and the 16th, which speaks of every accountable receipt or promissory note, must apply to accountable receipts of both kinds."

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(1) L. R. 5 H. L. 358.

Walker, L.J.

The next contention was that the omission to have current accounts with customers, and consequent omission to give cheque-books or have pass-books with customers, deprived Shields of the position of banker, and interesting evidence was given from the records of Childs' Bank, showing that the drawing of cheques upon current accounts was part of their business from very early times.

What we have to consider is whether the omission affects the application of 33 Geo. 2, c. 14. The right to draw in respect of current account arises from the deposit of money with bankers at call, which the depositor by the contract can draw upon by his order, called in the usage of bankers, his cheque. The difference in this contract and that contained in the ordinary deposit receipts, is one only of terms, and the evil struck at in favour of depositors with a banker by the statute equally applies. Lord Hatherley says:—"The evil to be struck at was an evil which in itself was applicable to all persons taking the money of others, and making themselves accountable for it on demand"; and Lord Westbury, after referring to the generality of the terms used—"any banker"—says:—"The word seems to be designedly extended to all classes of bankers, whether bankers of issue or bankers of deposit only." The evil of holding the money of others might exist in the most extensive form, if the contention were to prevail.

I do not think he is the less a banker within the Act, because his books are not in the form which expert witnesses, such as Bailey and Price, are accustomed to. The books answered the purpose, and it would be strange if a banker could exclude himself from the Act by the form of the books he kept, or—another argument used—by not keeping open office every day in the week, or omitting to register himself as a banker. The argument most pressed, and operating most on the minds of the witnesses for the Bank of Ireland, was that Shields was only a trader in a small way, and was not what they would call a

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banker, and Mr. Bailey finally sums up his position thus:—"His business was that of money-lender, on a considerable scale, accompanied with the receipt of deposits at interest to a large amount, and not the business of a banker." I am far from admitting that a person fitting that description might not be a banker within the 33 Geo. 2, c. 14. There is no doubt that he was called generally a banker, not in a false, but real sense, and Mr. Johnston in his letter of the 8th May, 1893, so describes him to his principals, and the Bank of Ireland lent him the money on the faith of his being a private banker. The fact that he was considered a banker, and dealt with as a banker by the class of customers and persons throughout Tyrone, for whose benefit the Act was designed, is more important than the view of a witness like Price, who would be likely to disparage the business of Shields, so small in comparison with his own, but when he stopped payment he held on deposit £107,254 12*s.* 5*d.*, a large sum out of the moneys of the class he traded with in a single county. There are some minor points suggested rather than pressed. The case of *Coe and The District Savings Bank* (1), is not like the present. It was a savings bank, and included in its memorandum of association objects quite foreign to the business of bankers. The question was whether it should be wound up under the Acts applicable to Banking Companies, which required registration as a Banking Company under them, and its constitution prevented it being so registered. The debts due on deposits only amounted to £18,000. Turner, L.J., commented on the fact of part of its business being "as dissimilar as possible" from the business of bankers, and in any event it was registered only under the Act of 1856, from which Banking Companies were expressly excluded.

Upon the whole I think the case falls within the principle applied in *Copland* v. *Davies* (2), to the construction of the 33 Geo. 2, c. 14, and, therefore, I concur in the reversal of Mr. Justice Ross' order.

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(1) 3 De G. F. & J. 335.

(2) L. R. 5 H. L. 358.

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HOLMES, L.J. :—

In the year 1759 a statute was passed by the Irish Parliament, the object of which, as shown by its title, was to repeal a former Act and to provide "a more effectual remedy for the security and payment of debts due by bankers." This statute is still in force, and the only question argued, on the hearing of this appeal, is whether Michael Shields, up to the time he stopped payment, was a banker within its provisions.

The last century and a half have been a period of great industrial progress in all civilized communities, and have consequently been marked by alteration and development in the mode in which every kind of business is carried on. The banker's occupation is no exception to the general rule, and has been obliged to adapt itself to the changed conditions of social and commercial life. Perhaps the most noteworthy point of difference is that while the banker's business has increased enormously, the banker himself as recognised and legislated for in the reign of George 2, has almost disappeared. Formerly a bank belonged either to a single owner or to two or more partners, whose customers were drawn from the city or district in which they lived; and it was best known to the general public by its notes payable to the bearer on demand, upon the issue of which there was no restriction, and which often formed the principal currency in the part of the country where it enjoyed credit. Private banks are now rare. Their place has been taken by joint stock companies embracing many shareholders and carrying on a much more extensive business spread over a far larger area. But notwithstanding this change in the proprietorship of banks, and notwithstanding the legislation which has restricted the issue of bank-notes, the essential features of banking have always been the same. Like other business, it is carried on for the benefit of those engaged in it; and this benefit is obtained by inducing members of the public to deposit their money with the banker so as to enable him to earn a profit by trafficking therewith. Of course depositors expect to gain some advantage. Occasionally they are satisfied with the assurance, derived from the capital and reputation of the banker, that their money will be safely kept; but for the most part, they are attracted by the offer of interest at a moderate rate or by the convenience of a current account. It is through these inducements to the public to become customers that the business of banking has developed. Interest-bearing deposits amounting in the aggregate to an extraordinary sum are now made by classes of the community which in former times never banked at all. Accounts current have expanded enormously. Cheques thereon have become the principal medium for circulating money; and both men of business and men of pleasure can find in the bank ledger an almost exhaustive statement of their receipts and disbursements. But whatever be the scale of operations, and whatever be the attractions offered to the public, the real business of the banker is to obtain deposits of money which he may use for his own profit by lending it out again.

Let me now see whether it is possible to ascertain from the language of the statute of 1759, whether this is the conception of a banker to be found therein. Its title, to which I have already referred, shows its object to be to provide a better means than previously existed for the security and payment of debts due by bankers—that is to say, of the debts the incurring of which is the principal feature in a banker's business. It appears from the preamble and other portions of the statute that the debts in contemplation were debts secured or evidenced by promissory notes and accountable receipts; the former being debts due in respect of the note issue, and the latter being debts due in respect of money deposited. An examination of the principal remedial provisions shows that the mischief they were intended to counteract was the false credit arising from the apparent possession of property that had been made the subject of secret charge or disposition—a mischief which would be specially operative in the case of those whose lodgments or deposits were not intended to be speedily withdrawn. Thus in title, preamble, and enactment, we find evidence that the Legislature contemplated persons who, as the essential part of their business, obtained money and credit from the public, and that this is the class designated as bankers.

The statute has from time to time been the subject of judicial consideration; but during the period of systematic law reporting, cases under it have been few. Irish banks have for a long time conducted their business with caution and prudence; and on the occasion of the last great failure of a bank to meet its engagements—the Tipperary Joint Stock Bank—it was held that the Act of George 2 does not apply to Irish Stock Banking Companies. The question has arisen once or twice whether a person engaged in other occupations, and who added thereto banking business on a small scale, was within the statute; and the principle to be extracted from such cases as *Stafford* v. *Henry* (1) and *In re Guinness* (2) is that if the banking is merely incidental to another business and not carried on as an independent undertaking, the statute does not apply. There is, I think, only one authority from which we gain assistance in deciding the matter now before the Court. In *Copland* v. *Davies* (3), it was held by the House of Lords that the Act of George 2 has not been repealed except as to such matters contained in it as have been the subject of special legislation, and that it is not confined to bankers issuing notes. In that case a gentleman, called Kennedy, carried on business in Dublin as a banker on a small scale, receiving people's money and giving them receipts therefor, issuing pass and cheque-books and dealing in the ordinary way of bankers; but he did not, nor indeed could he as the law stood, issue notes for circulation, upon which ground it was argued that the Act of George 2 did not apply to him. This contention was not without plausibility. As I have already said, banks in the last century were best known by their note issue to the general public, comparatively few of whom had money lodged with them; and all through the statute promissory notes are joined with negotiable and accountable receipts in referring to the banker's business. Yet notwithstanding this, Kennedy was held to be within the provisions of the Act, upon the ground that "the evil to be struck at was an evil which in itself was applicable to all persons taking the money of others and making themselves accountable for it upon demand."

The foregoing observations will, I hope, serve as a useful introduction to the inquiry upon which I now enter, whether Michael Shields was, from the month of May, 1893, until he stopped payment, a banker to whom the Act applied. I select the aforesaid date because he then for the first time had dealings with the Bank

(1) 12 Ir. Eq. R. 400.

(2) 1 Ir. Jur. 359.

(3) L. R. 5 H. L. 358.

of Ireland; and I see no advantage in going back to an earlier period. Although the business had always been carried on under the style of P. and M. Shields, Michael Shields was then its sole owner; nor was its character afterwards changed in any way. P. and M. Shields, both before and since described themselves as bankers; this title was given to them by their customers; and both in the letter written by the Manager of the Omagh Branch of the Bank of Ireland to his directors, when Michael Shields opened his account and ever afterwards in the Office Ledgers he was described as—"a banker."

His business consisted in obtaining deposits of money from the public, and in employing the money so received by lending it on promissory notes payable at short dates, and bearing interest at about eleven per cent. per annum, by making advances secured by mortgage, and by discounting bills of exchange and promissory notes. He also occasionally cashed American drafts, or facilitated a customer in transmitting or dealing with money; but I attach no importance to exceptional operations of this kind which did not form part of his regular occupation. The transactions in his usual course of business were on a very extensive scale. In May, 1893, the aggregate of the sums deposited with him were about £95,000 from over 1000 depositors; and when he stopped payment he owed to 1066 depositors £122,000. He held at the same dates promissory notes and bills of exchange which he had discounted, amounting to upwards of £40,000.

The mode in which money was deposited with him since March, 1893, has been in return for what is well known in Ireland as a deposit receipt. Before that time the security or acknowledgment given for the lodgment was a promissory note payable three months after demand, but for this there was then substituted an accountable receipt. There has been some variation in the form of this document, but in substance it acknowledges the sum deposited to be a debt bearing interest at £4 per cent. per annum, and requires three months' notice previous to withdrawal. The same mode of bank deposit was practised when the statute of 1759 was passed: and at the present day it is the source from which our joint-stock banks derive the largest portion of their funds. Why then are we to hold that Michael Shields was not a banker?

I put aside the witnesses who tell us that some loan funds are called banks, or that there is one grocer in Clonakilty and another in Skibbereen whose places of business are so designated. These affidavits with their exhibits were evidently got up by some one with a sense of quiet humour who did not like a rather ponderous case to be left without a smile in it. Reliance has been placed on the opinion of experts, but expert evidence is out of place in a case of this kind. It is quite right for gentlemen experienced in banking to examine the books kept by Shields, with a view of describing the kind of business done and the manner in which it was carried on; but when they draw the conclusion that he was not a banker, I attach no weight to their opinion. If I am called on to decide whether a man is a tailor or a carpenter, I do not require an expert to assist me, although his evidence might be valuable if the question were whether as a tradesman he was good or bad. I accept everything that these gentlemen say about the unscientific and careless character of Shields' bookkeeping; and I know that banks as a rule do many things for their own profit, or for the convenience of their customers, which Shields never thought of. But I have to look at the business he did, and to decide judicially whether by reason thereof he was a banker within the meaning of the Act of 1759. Some stress has been laid on the fact that Shields did not keep open shop every day. He had an office in three towns, and each office was open one day in the week for seven hours. I am not aware of any law regulating the time at which a banker is to do business. It has been found convenient for all bankers carrying on business in the same district to have uniform hours; and if one of them were to announce that his premises would be closed three days in the week, he would probably lose his customers. Indeed it is difficult to see how this could be even attempted if there were many current accounts, or much bill discounting. Still, I see no reason against a banker's confining himself to a class of business that can be done on three days of the week; and indeed the fact that Shields did so was relied on, less as an independent argument, than as evidence that he was not a banker.

The broad ground on which Mr. Ronan rested the case of the Bank of Ireland is that what he called the "banker's contract" is an essential feature of banking. He defined the "banker's contract" as the obligation to honour customers' cheques, and he argued that Shields was no banker because he did not receive deposits to be held by him subject to this condition. This idea of the "banker's contract" seems to me to be a discovery for which Mr. Ronan himself deserves the credit, for he has given no authority for it beyond a few words of Turner, L.J., in *Ex parte Coe* (1). The contract of a banker with his customer, like other contracts, depends upon what is agreed on between them.

If a stranger, without introduction, hands £100 across a bank counter for lodgment, he will be asked, does he propose to lodge it upon deposit receipt, and, if he replies in the affirmative, he will receive a document containing terms inconsistent with his being able to draw cheques against it. If he says that he intends it to be lodged to the credit of an account current, the banker will probably wish to know more about both himself, and the nature of the account he desires to open; and may, possibly, decline the business altogether, or accept it subject to conditions. No doubt if he receives the money unconditionally, he undertakes, by implication, to honour cheques to the amount of the balance in his hands; but this is not essential to its being a banking transaction. We have been told that Joint-Stock Banking Companies do not distinguish in their balance sheets the amount lodged on accountable receipts from that standing to the credit of current accounts, both being described as deposits, but I believe, as far as Ireland is concerned, that the former is largely in excess of the latter.

I asked during the argument, how Shields would be described by the respondents' counsel; and the reply was that he was a money-lender. I am unable to conceive in what sense he was a money-lender, which does not equally apply to every banking establishment in the kingdom. I know not how to describe Michael Shields, if he be not a banker; and, therefore, I am of opinion that the Act of 1759 applies to the equitable mortgages made by him to the Bank of Ireland. Indeed, a curious piece of historical evidence is found in the Statute Book, suggesting that the class of banker especially contemplated by the Legislature in the Act of 1759, was that to which Shields belonged. In *Hayden* v. *Carroll* (1), Lord Clare observed that it was the failure of what was known in Dublin as Malone's Bank that led to the Bankers' Act of 1759 being passed. The fourth chapter of 33 Geo. 2 is a special enactment relating to Malone's Bank, and the preamble sets forth the mode in which it carried on business. The three partners opened a house in Dublin for receiving lodgments, or deposits upon receipts to be accountable for such sums as were lodged to the person making the lodgment, or bearer, seven days after demand, with interest at the rate of tenpence for each hundred pounds, to commence three days after the date of the receipt. The moneys thus received were lent out again on real, or other securities, and the failure of the firm arose from their not being able to get in these sums in time to meet unexpected demands of the receipt creditors. This is very like the same sort of business as was done by Michael Shields, and probably the cause of the disaster in both cases was the same—the offer to depositors of too high a rate of interest.

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(1) 3 De G. F. & J. 335.

It is noteworthy that the 4th section of the Bankers' Act makes void notes, and negotiable or accountable receipts, containing an engagement to pay interest by a banker after a specified date. There seems to be some doubt as to whether this section has been repealed. It was not relied on by either side in the argument, and it has certainly not been acted on in later times. In any case, I presume that it did not avoid the debt itself, which might be recovered as money lent, and I only refer to it as showing that bankers' receipts, engaging to pay interest on deposits, were well known in the time of George 2. Whether I take the conception of a banker then or now, I hold that Michael Shields is one of the class, and that, therefore, the appeal must be allowed.

Solicitors for the appellants: *Hoey & Reynolds.*

Solicitor for the Bank of Ireland: *J. Malcolmson.*

R. D. M.

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(1) 3 Ridg. P. C. 545.

In re FOSTER'S ESTATE (1).

Appeal.
1901.
March 25.

Practice — Partition — Jurisdiction of Land Judge — Unincumbered share — Landed Estates Court Act, sections 79, 81—*Right of unincumbered owner to delivery of Order.*

Where, upon the petition of an incumbrancer on an undivided share of lands, an order for sale and partition is made by the Land Judge, the owner of an unincumbered share is entitled to delivery of the order for partition, allotting to him specific lands instead of his undivided share, although no sale has taken place.

On the 30th of March, 1897, Robert Bradshaw, as incumbrancer, filed a petition for sale of the undivided share of G. M. Knox and R. K. Knox, as trustees of the will of R. T. Forster, deceased, of certain premises in Belfast. The petition prayed that the lands might, if necessary, be partitioned for the purpose of the sale. A conditional order was made upon March 31, and on July 27, 1897, an absolute order for sale was made, and by the same order it was directed that the premises should be partitioned. The usual surveys and reports took place, and on November 20, 1900, a final order for partition was made by which different portions of the lands were allotted in severalty to the various owners, of whom there were eight, including the Rev. Macnevin Bradshaw. An application was made by the Rev. Macnevin Bradshaw to the Land Judge, that the final order for partition might be delivered out to him, in order that he might be able to deal as owner with the premises thereby allotted to him in severalty.

Ross, J., on the 25th March, 1901, refused the application, having reserved judgment for the purpose of examining certain unreported cases mentioned by the Registrar (2). The Rev. Mac-

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(1) Before Lord Ashbourne, C., and Fitz Gibbon and Walker, L.JJ.

(2) The following judgment was delivered by Mr. Justice Ross:—

This is an application on behalf of the Reverend Macnevin Bradshaw, that a final partition order should be delivered to him, notwithstanding the fact that no sale has yet taken place.

A petition was filed in the year 1897 by an incumbrancer on certain nevin Bradshaw, by leave of the Court, appealed *ex parte* on the same day.

G. Fitz Gibbon, for the appellant:—

The order was refused upon the ground that the jurisdiction to partition is merely incidental to a sale, and that if no sale were to be had, the order for partition and all other proceedings in the matter would be invalid and void. This view is based upon two passages in Madden and Jellett's Land Judges' Practice, pp. 101, and 192, and the decision of Monroe, J., in *Thompson's Estate* (unreported).

Admitting that the jurisdiction to partition under section 79, of the Landed Estates Court Act, is dependent upon and incidental to proceedings for sale, and assuming that the jurisdiction was not extended by the Judicature Act, still once the two requirements of section 79, viz. "an application for a sale under the Act of an undivided share of any land" and "an application by any party interested in such undivided share" for a partition, are complied with, the Court has full jurisdiction to partition, and this jurisdiction, once conferred, cannot be done away with by any subsequent proceedings.

The owners of the other undivided shares are presumably brought before the Court against their will, otherwise they would proceed under section 81, and once the Court has exercised its

undivided shares of the estate, praying for a sale and partition. The present applicant was entitled to other undivided shares of the same estate, and by the final order for partition certain premises in Belfast have been allotted to him in respect thereof. His property is unincumbered. If he could get his final order he could proceed to let or otherwise deal with his property. He suffers considerable money loss every week the order is withheld. Under these circumstances I should be glad to grant the application, if I am free to do so.

Section 81 of the Landed Estates Court Act provides for the case where all the owners of undivided shares join in applying to this Court for partition. Section 79 confers a power to partition as incidental to a sale of an undivided share. The real question is whether the partition order has any validity whatever until there is a sale. On page 192 of Madden and Jellett's Land Judges' Practice appears this statement:—"It may be well to observe here, that if a sale of a divided share does not take place, the partition is invalid."

jurisdiction and allotted lands in severalty to them in lieu of their theretofore undivided shares, they have no further interest in the matter, and the Court is in no way bound, and ought not, to tie up the property of non-litigant persons who have been brought before it against their will, and through no act or default of their own, until the parties to the litigation have completed all the proceedings necessary to bring the property to a sale.

The effect of a partition order in the Land Judge's Court is similar to that of the old judgment at Common Law as distinguished from a decree for partition in Chancery; the partition is effected by the order itself, and not by mutual conveyances: *Whaley* v. *Dawson* (1).

It is not necessary in proceedings in ejectment where the plaintiff claims under a partition order to prove that a sale was had before or after the partition or at all: *Blake* v. *Jennings* (2).

The elaborate provisions of section 79 for making a partition before sale are nugatory, if the partition is ineffective, and the order which is the title deed of the owners, cannot be obtained by them until a sale has taken place. The tenants are liable for rent to the owners in severalty from the date of the order, but the owners cannot sue them without it, and it may be impounded in Court for many years, while the owners of any share other than that for sale, have no *locus standi* in the Land Judge's Court,

This certainly represents the opinion of the Bar. I am aware that this was the opinion of Judge Flanagan, and is the opinion of Mr. Justice Madden. In an unreported case, *Thompson's Estate*, Mr. Justice Monroe seems actually to have so decided. The full facts appear in the final order for partition made on the 24th June, 1892. This order contains a recital, that a former order for partition remains inoperative in consequence of there being no sale.

Under these circumstances I regret that I cannot grant the motion. I am fully sensible of the inconvenience to the applicant by reason of its being withheld, and I am unable to see any good reason for withholding it. But my jurisdiction is merely statutory, and I cannot enlarge it by putting a construction on the section different from that which up to the present has prevailed.

W. C. S.

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(1) 2 Sch. & Lef. 372.

(2) 12 Ir. C. L. R. 458.

after the partition, either to force on the proceedings or to complain of delay.

LORD ASHBOURNE, C.:—

I see no reason for withholding the order.

FITZ GIBBON, L.J.:—

When the jurisdiction of the Land Judge's Court has once been attracted by a petition for the sale of an incumbered share of an undivided estate, to pay off incumbrances affecting that share only, and when an absolute order for sale has been made, and the owners of the remaining unincumbered shares have been brought in for the purpose of a partition, which the Court has jurisdiction to make in the interest of the incumbered share, and to facilitate the sale of it, I cannot see that the Land Judge can refuse to give their partitioned lands to the unincumbered owners to hold and deal with in severalty, in the same right, and with the same title, which they previously had with respect to their undivided shares. The jurisdiction to make the partition, before and for the purpose of the sale of the incumbered share, can not depend or be conditional, so far as the unincumbered shares are concerned, upon what may or may not be done with the incumbered share, or in reference to the sale of it, after the order which partitions the whole estate has been made and perfected.

WALKER, L.J., concurred.

The order made was—

> "Let the final order for partition in this matter, dated the 21st November, 1900, allotting in severalty to the said Rev. Macnevin Bradshaw the lands in the said order mentioned in lieu of his undivided share of the estate in this matter, be forthwith delivered out to the said Rev. Macnevin Bradshaw."

Solicitors for Mr. Bradshaw: *T. T. Mecredy & Son.*

R. D. M.

In the MATTER of THE MARRIED WOMAN'S PROPERTY ACT, 1882. JUDITH GAYNOR, Plaintiff; PATRICK GAYNOR, Defendant.

M. R.
1901.
Feb. 4.

(1901. No. 241.)

Husband and wife — Married Woman's Property Act, 1882 (45 & 46 *Vict. c.* 75, *s.* 17)—*Question between husband and wife as to property—Order restraining husband from interfering with business carried on by wife.*

A woman was possessed of a licensed public-house, in which she lived and carried on business. On her marriage the house and business remained her separate property, and the husband agreed not to interfere with the business. The husband lived in the house with the wife. Subsequently he ill-treated her, and systematically interfered with the business, and acted as if he was the owner of it, to the serious detriment of the business.

The Master of the Rolls on the hearing of an originating summons brought by the wife against the husband under sect. 17 of the Married Woman's Property Act, 1882, made an order declaring the wife entitled to the property, and restraining the husband from interfering with the business, but declined to make any order preventing the husband from entering the house.

Originating Summons.

This was an application by summons under section 17 of the Married Woman's Property Act, 1882, by the plaintiff Judith Gaynor, against her husband the defendant Patrick Gaynor, for an order that the premises and property specified in the schedule thereto should be declared to be the separate estate and property of the plaintiff, and that the plaintiff was accordingly entitled to the title and possession of the said premises and property, and that the defendant be restrained from entering into the said premises and from interfering with the said property, and for the costs of the application.

The property comprised in the schedule was as follows :—

1. Premises in the town of Kingscourt, in the county of Cavan, held under lease for lives renewable for ever, dated the

28th May, 1776, subject to the yearly rent of £1 2*s.* 9*d.* late Irish currency.

2. A seven day retail licence for the sale of beer, wine, spirits, &c., to be consumed on the premises, now in the name of Judith Gaynor the plaintiff.

3. The stock in trade, furniture, fittings, and chattels in the said premises.

4. The receipts or earnings received and to be received by the plaintiff from the retail trade of publican, carried on by the plaintiff on the said premises.

5. Any other property of the plaintiff forming part of her separate estate.

The material facts as stated in the affidavit of the plaintiff were as follows:—

John Courtney, father of the plaintiff, was assignee of the lease mentioned in the schedule, and carried on therein the business of a publican, with a retail publican's seven-day licence. By deed of October 12, 1886, the said John Courtney conveyed the lessee's interest in the premises to the plaintiff, who was then unmarried, as her absolute property, and transferred the licence into her then name of Judith Courtney, and made over to her by way of gift all the stock in trade, furniture, goods, chattels, and effects then upon the premises; and the plaintiff carried on the said licensed business in her own name from the date of the said assignment.

The plaintiff was married to the defendant in September, 1893; and by an agreement in writing made between her and the defendant the said premises, licence, stock in trade, furniture, and effects were to be and remain her sole and separate property, and the defendant was not to have any interest therein. This agreement was not forthcoming, and the plaintiff believed that it was in the possession of the defendant, and stated that she believed the effect of it was as above stated. The defendant had no property of his own, and went to reside with the plaintiff on the premises. There were no children of the marriage. Disagreements took place shortly after the marriage by reason of the plaintiff refusing to transfer the licence into the name of the defendant, which he requested her to do. At various times from October, 1894, down to December, 1900, the defendant assaulted and beat the plaintiff,

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for which he was summoned before the magistrates and fined and imprisoned. When in the house he systematically interfered with the plaintiff's business, and acted as if he was owner of it. He was constantly drunk, and took money out of the till. He used to serve customers, and keep the money received from them. The result of his interference and misconduct was that the business was seriously injured. At the time of the application the defendant was not living in the house, but the plaintiff was in daily fear of his returning to the house and illtreating her again and interfering with the business as before.

Philip White, in support of the application:—

There is jurisdiction to make the order asked for under section 17 of the Married Woman's Property Act, 1882 (1). There is a "question between husband and wife as to the title to or possession of property," as the conduct of the defendant amounts to a claim to the property as his own. Section 12 gives a married woman the same civil remedies against all persons, including her husband, for the protection and security of her separate property, as if it belonged to her as a *feme sole*. In *Wood* v. *Wood* (2), which was a proceeding by bill, Malins, V.-C., made an order similar to that asked for here. In *Symonds* v. *Hallett* (3), which was an action by a wife against her husband and the trustees of her settlement, an *ad interim* injunction was granted restraining the husband from entering upon or taking, or continuing in possession of, the house which was the separate property of the wife; and the Court of Appeal refused to interfere with the order. The difficulty suggested there and in *Weldon* v. *De Bathe* (4), of making an order preventing a husband from access to his wife's house, does not arise here, as the defendant does not go to the house for *consortium*, but to interfere with her business. [He also referred to Lush on Husband and Wife, p. 467.]

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(1) Sect. 17.—"In any question between husband and wife as to the title to or possession of any property, either party . . . may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice . . . in Ireland, . . . and the Judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit."

(2) 19 W. R. 1049.

(3) 24 Ch. D. 346.

(4) 14 Q. B. D. 339.

The only other remedy the plaintiff has is to take proceedings for a divorce, but she cannot afford the expense.

The defendant was served with the summons, but did not appear.

THE MASTER OF THE ROLLS:—

This application is brought for a purpose which is quite justifiable, but the question is, how far I have jurisdiction to make an order under section 17 of the Married Woman's Property Act, 1882. I have before me the official record of the conviction of the defendant, and I am satisfied that he has treated the plaintiff very badly, and has used the premises in a way inconsistent with her right to carry on her business therein without molestation. I am also satisfied that the business is her separate property, and I think that the case comes within section 17 of the Married Woman's Property Act, 1882, and that I have jurisdiction to decide as to the property being the separate estate of the wife. The section says, "In any question between husband and wife, as to the title to, or possession of property." I think that there has been a question between husband and wife, as his conduct amounts to a claim by him on the property.

But it is another matter how far the order should go. I have a great objection to do indirectly that which could be done directly by proper proceedings, viz. to grant a judicial separation. I do not know if the plaintiff has any remedy by an application to a magistrate, but I am asked to make an order, which would amount to a judicial separation, that not only is the husband to be kept out of the premises, but that she is to continue in them, as she must do, if she is to carry on the business there. What order then should I make? It appears that the plaintiff was married to the defendant in 1893, and that in 1886 her father made the property over to her, and that there was an agreement in writing on her marriage with the defendant, which is not forthcoming, but which she says provided that the premises, licence, stock in trade, furniture and effects on the premises were to remain her separate property. I think that the plaintiff has established her right to the property mentioned in the schedule to the summons, omitting the last paragraph (5) thereof, and that she should be declared entitled to the same and the possession thereof, as between herself and her husband. But now comes the point, the summons asks that the defendant be restrained from entering into the said premises and from interfering with the said property. I do not see my way to go so far as that. I can make an order that he be restrained from interfering with the property and the business, and for costs.

In *Wood* v. *Wood* (1) an order was made by Malins, V.-C., restraining the husband from in any way interfering with the conduct of the business of a private hotel keeper, and from continuing in possession of the private hotel and premises, or any part thereof. The husband there had by post-nuptial settlement entered into a contract with his wife, by which she was to conduct a hotel for the benefit of herself and children, and to occupy it as a *feme sole*. Malins, V.-C., held that the husband had violated the contract by entering into possession of the hotel, and that, therefore, the plaintiff was entitled to an injunction in the terms of the prayer of the bill. That injunction was very nearly equivalent to a judicial separation. The decision was on the ground that the husband had contracted that he should not interfere with the possession of the wife, and that a Court of Equity would enforce such a contract. *Symonds* v. *Hallett* (2), where *Wood* v. *Wood* (1) and other cases were discussed, does not go so far, though there the Court of Appeal held that the wife was entitled to an interim injunction restraining the husband from entering the house, because he claimed the right to go to and use the house, not as a husband to enjoy the society of his wife, but for his own purposes, and in *Weldon* v. *De Bathe* (3), the Court of Appeal intimated that though a husband is entitled to enter his wife's house against her will in order to enforce his marital rights, he is not entitled to do so for any other purpose, but no decision was given on the point, as it was not necessary.

I am, therefore, only justified in making an order, declaring the right of the plaintiff to the property, and restraining the defendant from interfering with it. If the defendant persists in

(1) 19 W. R. 1049. (2) 24 Ch. D. 346. (3) 14 Q. B. D. 339.

coming into the premises and ill treating the plaintiff, she ought to take proceedings for a judicial separation.

The following order was made:—

> "THE Judge doth declare that the premises and property specified in the schedule hereto are the separate estate and property of the plaintiff, and that the said plaintiff is accordingly entitled as between herself and the defendant, to the possession of the said premises and property; and the Judge doth order that the defendant be and he is hereby restrained from in any way interfering with the said property or with the business and trade of a licensed publican, carried on by the said plaintiff in the said premises held under the lease in the said schedule mentioned; and the Judge doth order that the said defendant do pay to the plaintiff her costs of this application when taxed and ascertained, and doth certify for counsel."

[SCHEDULE.]

Solicitor for the plaintiff: *Francis M'Breen.*

W. L.

M. R.
1900.
Nov. 8, 9, 21.

SHIELDS *v.* THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND.

(1899. No. 882.)

Banker and customer—Executor paying trust money into credit of his own account—Liability of bank.

A lodged to the credit of his private account at a bank moneys which belonged to him and B, as executors of C. The bank had notice that the moneys so lodged were trust moneys, but had no notice that A intended to commit a breach of trust, and placed the moneys to the credit of A's account in the ordinary way. A afterwards became insolvent, and his account was overdrawn. B brought an action against the bank and A, to have it declared that the bank were trustees of the moneys so lodged on behalf of B and A, as executors of C:—

Held, that the bank were not liable.

TRIAL OF ACTION.

The facts of the case and the authorities cited are sufficiently stated in the head note and judgment.

Nov. 21.

The Solicitor-General (*Wright, Q.C.*), *Henry, Q.C.*, and *Patchell*, for the plaintiff.

T. Pakenham Law, Q.C., *Ronan, Q.C.*, and *Pim*, for the defendants, the Bank of Ireland.

The Master of the Rolls :—

This action was brought by James Shields against the Bank of Ireland and Michael Shields to have it declared that certain sums of £1330, £142 19*s.* 7*d.*, £1504 15*s.* 6*d.*, and £967 15*s* 4*d.*, were assets of Patrick O'Neill, deceased, and that the defendants, the Bank of Ireland, were trustees of the said moneys on behalf of the plaintiff and the defendant Michael Shields, as executors of the said Patrick O'Neill, deceased. Patrick O'Neill, of Annaghmore, in the county of Tyrone, died on the 3rd February, 1897, having by his will, dated the 27th October, 1891, appointed the plaintiff and the defendant Michael Shields his executors. His will was proved by James and Michael Shields, on the 23rd Sept., 1897. It appears from the statement of claim that Michael Shields was the proprietor of a private bank at Cappagh, in the county Tyrone, and had an account at the Omagh branch of the Bank of Ireland, and that the sums claimed in this action represented the proceeds of the realisation of the assets of Patrick O'Neill, which were lodged from time to time, between November, 1897, and January, 1898, to the credit of Michael Shields' account at the Omagh branch. The plaintiff alleges that the bank had notice through their agent, that the moneys so lodged were assets of Patrick O'Neill. Shields' Bank failed, and, his account with the Bank of Ireland being considerably overdrawn, the plaintiff alleges that the moneys so lodged, which were assets of Patrick O'Neill, were appropriated by the bank to discharge Shields' indebtedness to them.

The bank by their defence, admit that the sums claimed were lodged to Michael Shields' account at their Omagh branch; but they say that they had no notice that these sums were assets of Patrick O'Neill, and that they were placed to the credit of Michael Shields' account in the ordinary way, and drawn against by him, leaving a large sum due by him to the bank. The first of these sums consisted of a deposit receipt of the Hibernian Bank for £1330, with interest thereon, amounting to £142 19*s.* 7*d.*, and referred to in a letter of November 25th, 1897, from Michael Shields to the bank. The second sum was a deposit receipt of £1504 15*s.* 6*d.* of the Antrim Iron Ore Company, in the names of Eliza and Patrick O'Neill, which is referred to in a letter of the 29th January, 1898, from Michael Shields to the bank. The money had belonged to Eliza O'Neill, but it was admitted that it was assets of Patrick O'Neill. The third sum was a sum of £960 17*s.* 4*d.* Consols, which stood in the names of three persons, of whom Eliza O'Neill was one. This latter money was received by the executors and lodged in bank. I said during the argument that I thought it was out of the case, and that view was acquiesced in; for whatever case could be made as to the first and second sums, there was no proof that the bank had notice that this sum was part of the assets. It was suggested that the bank might have conjectured that it was assets, and it was placed to the credit of the account of James and Michael Shields, but there was no suggestion of notice to the bank that the money was theirs as executors. The case therefore turns on the first and second sums.

The first sum was the Hibernian Bank deposit receipt for £1330. This was enclosed in a letter of the 25th November, 1897, from Michael Shields to Mr. J. B. Burrows, the Manager of the Bank at Omagh, which was as follows:—

P. & M. SHIELDS, BANKERS,
Altmore, Pomeroy, Tyrone.

OFFICES:—*Dungannon*—Union Lane, every Thursday; *Carrickmore*—Every Friday;
Cappagh—Every Saturday. HOURS:—*From* 11 *a.m. to* 6 *p.m.*

25th November, 1897.

ORDERS, £1330 0 0
4 10 0
—————— £1334 10 0

DEAR SIR,—Please put proceeds of enclosed to credit of account, and oblige.

Yours truly,
MICHAEL SHIELDS.

J. B. BURROWS,
Manager, Bank of Ireland, Omagh.

HIBERNIAN RECEIPT.

James Shields and I are executors to a will which has been administered. My brother, P. Shields, will call with you to-morrow, and explain it.—M. S.

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The brother Patrick referred to in this letter was a solicitor, who died lately when the trial of the action was pending. This letter shows that James and Michael Shields were executors. Mr. Burrows, by letter of the 26th November, sent on the deposit receipt to the Hibernian Bank, and the proceeds were placed to the credit of Michael Shields' account at the Omagh branch of the Bank of Ireland. There is no question that the bank had notice that it represented money belonging to an estate of which James and Michael Shields were executors, and that the estate was that of Patrick O'Neill.

The second sum, namely, the Antrim Iron Ore Company's deposit receipt for £1504 15*s.* 6*d.*, could not be cashed in Tyrone. It had to be sent to Belfast, and was sent thither to Mr. Burrows, who had been manager of the bank at Omagh, and was afterwards assistant manager at Belfast. This appears from a letter from Michael Shields to him, of the 29th January, 1898, which was as follows:—

P. & M. SHIELDS, BANKERS,
Altmore, Pomeroy, Tyrone.

Offices:—*Dungannon*—Union Lane, every Thursday; *Carrickmore*—Every Friday; *Cappagh*—Every Saturday. Hours:—*From* 11 *a.m. to* 6 *p.m.*

29*th January*, 1898.

Patrick O'Neill, Deceased.

Dear Mr. Burrows,—My brother, James Shields, was executor with me in a will made by deceased. There is a sum of £1504 15*s.* 6*d.* coming from the Antrim Iron Ore Company. The deposit receipt and another receipt will be forwarded to you. I wish you to send the cash to Bank of Ireland, Omagh, but not give up the papers until you are sure all is right. With kindest regards, and hoping you continue in your usual good health.

I am, yours very truly,

MICHAEL SHIELDS.

J. B. Burrows, Esq.,
Manager, Bank of Ireland, Belfast.

The bank suggested that this was not a banking transaction, but only a private affair between Shields and Burrows, but this was disproved by Burrows' evidence. He was acting in discharge of his duty as manager. The proceeds were placed to the credit

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of the account of Michael Shields in the Omagh branch of the bank. The letters show that the bank was dealing with Michael Shields, and had notice in a most specific way that it was dealing with the assets of Patrick O'Neill.

The plaintiff's case is a very simple one. The money constituted assets of Patrick O'Neill. The bank knew this. It was a breach of trust on the part of Michael Shields, the defendant, and of the plaintiff to lodge it in bank to the credit of the current account of the former. But the bank accepted it in that way, knowing that the money thereby became liable to make good the indebtedness of Michael Shields to them, a use to which it was actually applied. Thus the money of Patrick O'Neill's legatees was applied to pay off the personal debt of Michael Shields. It was, indeed, a little more than this, for, to take the case of the first lodgment, Michael Shields' account was actually overdrawn to the extent of £13,500 or thereabouts; but the overdraft was secured by a deposit of title deeds representing property stated to be worth £30,000. In accordance with the invariable custom of bankers, each lodgment is credited on the day on which it is made, just as each draft is debited and a daily balance struck. Thus, on November 26th, 1897, the account of Michael Shields' indebtedness was reduced by the whole amount of the deposit receipt. I would point out, however, on this point, which was much pressed, namely that the account of Shields was largely overdrawn at the time, that that circumstance would not seem to me really to affect the case. It is a fact to be considered; but the bank was not pressing Shields to reduce his account. They had perfect confidence in him, and actually increased his overdraft by £3000, later on. And if his account had been in credit, or balanced, at the time, the lodgment of £1320 of Shields' assets would, of course, have enabled him to the knowledge of the bank to draw it out, every penny. Thus, in either case, the lodgment of trust funds to his own personal credit was a breach of his duty as trustee. I do not, however, find any evidence or any reason to suppose that Michael Shields had a dishonest motive in blending the O'Neill assets with his own funds. There is no ground for assuming that he thought himself insolvent at the time. As matter of fact, all the pecuniary legacies were paid by him out of the sums he drew from the bank, and I have no doubt he meant to pay everybody. Had he been told that the lodgment to his own account was improper, and that he ought to open a separate one, either a trust account, or a No. 2 account, or the like, I think he would have done so without hesitation; my reason for saying so is, not merely that he appears to be an honest man (so far as I could judge), but far more, that the whole transaction was so extraordinarily open, so frankly disclosed, that I cannot suppose he thought he was doing an improper, or even a questionable, act. Mr. Law, for the defendants, the Bank of Ireland, was very slow in admitting that they knew that the moneys were held by Michael Shields as executor. I can only say that I have never known a case in which notice was in question where it was so fully and clearly proved (as regards the two funds in question), and further that the fulness and clearness of it appear to me to serve the case of the bank. Here are two executors, both respectable men, who concur in placing a trust fund to the credit of one of them. Surely, as one of them could derive no benefit from the transaction, yet joined in disclosing it candidly to the bank, while another brother, a solicitor, also presumably a person of character and uninterested, actually helped in carrying it through, with knowledge of all the facts, it is not possible to impute to the bank notice of anything more than the mere fact that the money was in the hands of James and Michael Shields, as executors of O'Neill, and it must be taken that by their conduct they and Patrick Shields all represented to the bank that the transaction was quite free from impropriety. *Bodenham* v. *Hoskyns* (1) was cited for the proposition, which, indeed, is embodied in the headnote of the report: "It appearing upon the evidence that the bankers were aware that the money was the produce of the rents of the plaintiff's estate (over which one of the parties who had opened the account was agent) a decree was made against the bankers for repayment of the account." This, if borne out, and if the case remained as an authority, would go as far, or almost as far, as the plaintiff requires. It would seem to imply that mere knowledge of the existence of a trust was enough. But it is not

(1) 21 L. J. Ch. (N. S.) 864.

so; and though, if the head-note be taken all together, it is, perhaps, not incorrect, the passage in question, if isolated, would not be a correct statement of what was decided in the case. Sir Richard Kindersley says, at p. 868: "I approach the question as to the participation of the bankers in this misconduct of Parkes—how far the bankers (the defendants) were in any way participators in this misconduct of Parkes: participators in the act they were, but it does not follow, because they were participators in the act, that, therefore, they were participators in the fraud of Mr. Parkes. Let us see, therefore, what was the position of the bankers in the matter. I entirely agree with many of the observations which have been made by counsel for the defendants, that, as between banker and customer, the banker looks only to the customer, in respect of the account opened in that customer's name; and whatever cheques that customer chooses to draw, the banker is to honour. He is not to inquire for what purpose the customer opened the account; he is not to inquire what the moneys are which are paid into that account, and he is not to inquire for what purpose moneys are drawn out of that account: that is the plain general rule as between banker and customer." He says again, at p. 872: "Now, whether the bankers in their own minds, or even in their own books, if the fact had been so, treated the Rothenwas account as if it had been the private account of Mr. Parkes, the question is whether they had a right to do so; whether they had a right to say—knowing from the facts that the money placed to the account was Mr. Bodenham's money, and that any balance standing to the credit of that account at at any time was Mr. Bodenham's balance—that they could make such an arrangement with Mr. Parkes, as that at any time they should be at liberty to appropriate the balance to the credit of that account, towards the liquidation standing to the debit of the private account of Mr. Parkes": and at p. 873 he concludes by saying:—"I am constrained to arrive at the conclusion that the bankers, although I must exonerate them from any dishonest intention to commit a robbery or commit a fraud, still were not only parties to the simple fact of the transfer, but were parties to the fraud in question in this sense, that they were aware of the circumstances which made it a fraud in Parkes, to make the transfer to his private account, and being cognisant of that, and having been cognisant of it before the time when the account was opened under the name of 'The Rothenwas Account,' and being cognisant of it throughout, they concur in a transaction, the effect of which is, that for their own pecuniary benefit an act is done by Parkes which is a fraud upon the plaintiff. Now, according to the plain principles of a Court of Equity such an act can never be sustained."

Thus the Vice-Chancellor held that they were not only parties to the account, but parties to the fraud, though he very charitably refrains from arriving at the inference, which he might well have drawn, that the bankers deliberately intended themselves to commit a robbery or a fraud. In *Pannell* v. *Hurley* (1), Knight-Bruce, V.-C., held the bankers liable, a trustee having drawn out money standing to his credit in an account headed, "Henry Pannell's estate, *per* Joseph Davy, trustee," and placed the cheques to the credit of two other accounts in the same bank, one his private account, £71 16*s* 9*d*., which balanced it, and the other, £236 15*s*. 3*d*., that of his firm. The latter cheque nearly exhausted the trust account. The judgment is a very short one. "Money is due from A to B, in trust for C. B is indebted to A on his own account. A, with knowledge of the trust, concurs with B, in setting one debt against the other, which is done without C's consent. Can it be questioned in equity whether such a transaction can stand? There is nothing more in the case than that. The debt of £300 and a fraction remains due from Hurley and Whitter to the trust estate." He puts it on the ground that the bank had concurred in plain open robbery. He says during the argument, at p. 243: "If the only notice to the bankers had been the title of the account, this might have been a case of more difficulty." In this case too, as in the last, the transaction was fraudulent on the face of it.

There was a case of *Wilson* v. *Moore* (2), in which Lord Brougham held in the course of a very elaborate judgment, which will well repay perusal, that the defendants, the commercial correspondents of the executors, were liable. But

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(1) 2 Coll. C. C. 241.

(2) 1 My. & K. 337.

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upon what ground? He says, at p. 352: "Two things here are abundantly evident, and they are sufficient to decide the whole question. First, that the executors were taking a fund which did not belong to them as traders, but was entrusted to them as representing its owner, and were using it for the purpose of their trade, and secondly, that Joseph Marryat and Son were fully aware of that fact, and lent themselves, as far as it was possible for them, to the proceedings of the executors, by which they themselves more or less profited." And again, at p. 357, he says: "The following passage conveys at once the opinion of His Honor and of Lord Eldon upon the point, and appears to decide the present case in express terms: 'I cannot but lean strongly to Lord Eldon's view of *McLeod* v. *Drummond* (1). If a party dealing with an executor for the personal assets, pays his money to the executor, so that it may be applied to the purposes of the will, he is not responsible for the executor's misapplication of it; but if, in dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor, or to the private trade of the executor.' And now let us ask, where is the mischief of holding parties bound by such obvious rules of common justice and honesty? It is true, a purchaser must not be held bound at every step of each transaction in business to pause and institute inquiries; to try issues, and take accounts. But if the proof be thrown on those who would impeach his dealings with the executor; if they be held bound to show that in those dealings he knew the executor was misapplying the trust funds, and that he aided him in the malversation, surely no hardship is inflicted, should he be held answerable for a conduct plainly improper."

Ex parte Kingston; In re Gross (2), was also relied on by the Solicitor-General, though it is hard to see what bearing it has upon the present question. The decision was this. A man, who was a county treasurer, lodged the money of the county in bank to an account, entitled "Police Account." He had also a personal account in the same bank. The bankers knew that the

(1) 17 Ves. 152.

(2) L. R. 6 Ch. 632.

money to the credit of the Police Account belonged to the county, and when the customer failed, they sought to close upon the money to the credit of the Police Account, to make good the deficiencies on overdraft upon his own account. Naturally it was held that this could not be done. Why? James, L. J., having stated the facts of the case, says, at p. 639: "In my mind, this case is infinitely stronger than those referred to during the argument, in which a similar claim by bankers was disallowed, for in those cases the bankers relied on cheques drawn by the customers; and if a banker receives from a customer holding a trust account a cheque drawn on that account, he is not in general bound to inquire whether that cheque is properly drawn. Here the customer has drawn no cheque, and the trustees are seeking to set off the balance on his private account against the balance in his favour on what they knew to be a trust account. I am of opinion that the appeal ought to be dismissed, and dismissed with costs."

Foxton v. *Manchester and Liverpool District Bank* (1) professed to follow *Wilson* v. *Moore* (2), though, as is pointed out by Byrne, J., in *Coleman* v. *Bucks and Oxon Bank* (3), it contains expressions in the judgment of Fry, J., going beyond what can have been intended by that learned Judge. Byrne, J., says, at p. 253: "That was a case where a sum of money was standing in the books of the banking company to the credit of 'the account of the trustees of the late W. H.,' and the bank, knowing that the trustees (each of whom had an overdrawn account at the bank) were not beneficially entitled, allowed them to transfer sums at different times from the trust account to their respective private accounts, and it was held that the *cestuis que trust* were entitled to recover from the bank the sums so allowed to be transferred. That was a case depending upon the evidence. I need not go into all the circumstances; but there was a benefit designed for the bank, who had been calling upon parties having private accounts to reduce their overdrafts, and they did it with the intention of reducing their indebtedness."

(1) 44 L. T. (N. S.) 406.

(2) 1 My. & K. 337.

(3) [1897] 2 Ch. 243.

Byrne, J., then quotes from the judgment of Fry, J., in that case, and proceeds as follows: "I am asked to say that that amounts to a decision to this effect, that wherever there is an account, which upon the face of it is a trust account, and the customer draws a cheque upon that account, and pays in the cheque to the credit of his private account, the bankers are bound to see and inquire (that is how I understand the proposition is put) that the customer is in point of fact entitled to the money which he so transfers from one account to another. I do not think that that was the meaning of the learned Judge in that case. If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of trust, and if they are going to derive a benefit from the transfer, and intend and design that they should derive a benefit from it, then I think that the bankers would not be entitled to honour the cheque drawn upon the trust account, without some further inquiry into the matter."

In *Foxton* v. *The Manchester and Liverpool District Bank* (1) the bank knew that the executors had no beneficial interest, and that the transaction was a simple breach of trust. I shall advert to *Coleman's Case* (2) again.

On the other hand, the authorities clearly demonstrate that it is not enough, in order to fix a banker or other agent of an executor with liability, to show that the executor actually committed a breach of trust, and that the bank, knowing him to be an executor and knowing that the fund was trust money, permitted him to obtain it, and so to be in a position to misapply it. You must go further, and show that the bankers knew of and concurred in the intention to misapply, a knowledge which will easibly be presumed if the banker derives a personal benefit from the transaction designed or stipulated for. In most of the cases the question has arisen on payment out of money standing to a proper credit, and transferred to the private account of the trustee, or otherwise dealt with as if free from any trust. The case before me is different. The breach of trust, if any, was complete the moment the money reached the bank, for there was not any question of setting up a trust account at all. But the case cannot at any rate be stronger against the bank than if the executors had lodged the money to an account headed (say) "Executors of Patrick O'Neill," and had then drawn it out, and lodged it to the credit of the account of P. and M. Shields. I should say that, if there were any difference, the case before me is less unfavourable to the bank.

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(1) 44 L. T. (N. S.) 406.

(2) [1897] 2 Ch. 243.

I do not dwell upon *Keane* v. *Robarts* (1), for though the case was stated in pleading as one of fraud, it was "the case of agents of the executors receiving money by the authority of the executors, and remitting it to them in the course of their duty as agents, and in the proper forms of business, leaving the application of it to the purposes of the will wholly in the power of the executors." It is important, however, for the opinion of Sir John Leach, V.C., at p. 356, where he says: "Every person who deals with an executor, knowing his character of executor, has necessarily implied, if he has not express, notice of the will, but all dispositions made by a will of personal property are by law subject to a prior charge for the payment of debts, and as a purchaser of real estate devised in aid for the payment of debts is not bound to inquire into the fact, whether the sale is made necessary by the existence of debts, because he has no adequate means to prosecute such an inquiry; so he who deals for personal assets is for the same reason absolved from all inquiry with respect to debts; he has a right to assume that the executor sells in the necessary course of his administration; and it is upon this principle, altogether indifferent what dispositions may be made in the will with respect to the personal property for which he deals; for whether it be specifically given or be a part of the residuary estate, it is equally charged by law with payment of debts; if it were otherwise, the powers of an executor would be wholly inadequate to the administration of the testator's estate. In this particular case, however, the remittance of the assets to Ireland was not necessarily a breach of trust in the executors. According to the declared purposes of the will, the executors would have been authorised by the will to invest the £25,666 either in the Irish funds, or on real security in Ireland."

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(1) 4 Madd. 332.

But in *Gray* v. *Johnston* (1) the facts cannot be distinguished from those in the present case in any sense favourable to the case of the plaintiff. I take them from the judgment of Cairns, L.C., at p. 9: [The Master of the Rolls here read from the judgment, and proceeded as follows]:—Lord Cairns says at p. 10: "I think your Lordships will be of opinion that the main question which your Lordships have to consider is this: what, on the occasion of the presenting of that cheque, was the duty of the Messrs. Gray? Were they at liberty to say that they would refuse to honour it, and refuse to make the payment which they had undertaken, by the letter I have read, to make? Or were they bound to honour the cheque, either by payment in money, or by carrying it to the account of those who were the holders of it?" And, at page 12, he says:—"And farther than that, I take leave to doubt very much whether the mere fact that some breach of trust, as regards this trade, had in times past been committed by their customer would, alone, have entitled the bankers or justified them, in refusing to honour the cheque of their customer, unless it could be shown that they knew as regards that particular cheque, that it also was to go in the same line of misapplication. As regards the third ingredient existing in some of the cases to which I am referred, merely personal benefit to the bankers designed or stipulated for, it was suggested here that inasmuch as the account of the new firm of Johnston & Mayston, if balanced on the particular day on which the cheque was credited to them, would have been found to have been overdrawn, the bankers derived a benefit in this, that the cheque was placed to the account of Johnston & Mayston, and so diminished or wiped out the balance that otherwise would have existed against them. But when the matter comes to be looked at it appears to stand thus—no complaint was made by the bankers of Messrs. Johnston & Mayston having overdrawn their account, and no payment was asked by the bankers from them. In no way were the bankers benefited by this transaction except this, that, apparently as a mere matter of ordinary business routine, the cheque was carried to Johnston & Mayston's account, and inasmuch as on that particular day they were debtors on their account the balance was diminished in favour of the bankers by the payment of the cheque. But I carefully use, and I think your Lordships will hold that it is proper to use, the words 'benefit designed or stipulated for,' because with regard to a benefit arising in the way in which it arose in this case, it appears to me wholly impossible to imagine that the bankers can have been influenced, in any degree, in their conduct by the indirect and incidental benefit which they thus derived." Nor is there any inconsistency with this in the opinion of Lord Westbury, who says at p. 14: "The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honour his draft on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an inquiry as between his customer and a third person. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer." And at page 15, he says: "The question therefore resolves itself into one of fact. Can the payment of that money to the credit of the account of the new firm be properly treated as a payment for the benefit of the bankers, designed and intended to be the means of payment to the bankers of the debt that might be due to them on the new account?"

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(1) L. R. 3 H. L. 1.

In the present case no benefit whatever to the bank was either designed or stipulated for, nor is it shown that any benefit accrued to them. No doubt the O'Neill money was to the credit of P. and M. Shields; but between the 26th November, 1897, and the 31st December, 1898, the money paid into the bank to the credit of that account, amounted to £21,407, and the drawings to £22,356. Had less been paid in, less would have been drawn out: at least this would be the natural and ordinary result.

Another case in the House of Lords, which was relied on by the defendants, was *Thomson* v. *Clydesdale Bank, Limited* (1); but it differs from the present case so widely in its facts, that it can only be of much present value for the principle thus stated by Lord Chancellor Herschell at p. 287: "It cannot, I think, be questioned that under ordinary circumstances, a person, be he banker or other, who takes money from his debtor in discharge of a debt, is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But it is said that in the present case the bankers took with notice that the sum which they received was a sum of money not belonging to their debtor personally, but which he held or had received for other persons, and that, having had this knowledge or notice, they are not entitled to retain it in discharge of Mr. Thomson's debt. My Lords, I cannot assent to the proposition, that even if a person receiving money knows that such money has been received by the person paying to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment, and properly discharging the debt due to the person who receives the money. No doubt, if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon."

The case, which in some of its features most nearly resembles the present, is also one of the latest. I mean *Coleman* v. *Bucks and Oxon Union Bank* (2), to which I have already referred in connection with *Foxton's Case* (3). There is, however, at least one very remarkable difference between the facts in the two cases. In *Coleman* v. *Bucks and Oxon Union Bank* (1), not merely did the bank receive the money with knowledge that it belonged to a trust account, but it was remitted to them by a firm of solicitors, expressly for the credit of a trust account of their customer, James Gurney. There being no such trust account, the bankers carried the money, £1411 2*s.* 2*d.* to the credit of Gurney's private account. Byrne, J., at p. 246, says: "Now, at the date when this money was paid in, namely, on the 18th August, 1892, James Gurney's account was overdrawn to a considerable extent at the bank; but the manager of the bank had not the slightest suspicion or reason to suppose that James Gurney was not in a perfectly good and solvent condition. They allowed him this overdraft on security. The manager when he received this advice, knew that the £1411 2*s.* 2*d.* was money forming part of some trust or other. He did not, however, consider, having regard to what he knew of James Gurney and his position, that there was any necessity for making any special inquiry about it. He did not consider himself justified, on these instructions, in opening a new account in James Gurney's name; so he, of his own motion, credited it to the private account, the only then existing account of James Gurney. Now I am satisfied upon the evidence, that the bank had not the slightest intention at that time of benefiting themselves by what was done. I am satisfied that they had no notion that James Gurney intended to commit a breach of trust, by making away with that money in any way."

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(1) [1893] A. C. 282.
(2) [1897] 2 Ch. 243.
(3) 44 L. T. (N. S.) 406.

In the present case, the bank had notice that the two sums in question had come to the hands of their customers, James and Michael Shields, and that they were the executors of Patrick O'Neill. What were they to do when the money was brought to be lodged to the credit of Patrick and Michael Shields' account? Were they to say, show us how you as executors are entitled to lodge this to the account of one of yourselves? Fancy such a question being put across the counter by a bank clerk! And if the money was once received and dealt with in that way, what was to be done? The bank had no power of themselves to set up a new account, "trust account, &c." The whole thing was completed once the credit was given to the account of P. and M. Shields. Yet for all the bank knew, the fund might have belonged to Michael Shields beneficially. They knew there was a will. They did not know what the will contained. This is proved as a fact, and even if they had known, Shields might have been entitled to the money as his own, if he had advanced equivalent sums of his own for the estate. That this, as now appears, was not the case, they did not know, and were not bound to inquire. The legatees or persons entitled to the residuary estate might have asked Shields to keep the money at interest, as he did so many other funds. He might have needed it to pay debts of the testator, and might readily want it at call to pay legacies; and indeed he did pay many, if not all, of the pecuniary legacies out of the same account. He might even have been residuary legatee himself. No misappropriation was intended by him. This was expressly admitted by the plaintiff's counsel. Still less was any benefit to the bank intended or contemplated, much less stipulated for. As I have said, I am not at all sure that any in fact accrued.

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(1) [1897] 2 Ch. 243.

Unless I were to hold that the bank, if knowing these moneys to have come to the Shields as executors of O'Neill, were not only entitled, but bound, to call on them to furnish, and perhaps to vouch, administration accounts of his estate before receiving them to his credit, I cannot come to the conclusion that they are answerable for allowing them to be placed to whatever credit the two executors chose. The contention of the plaintiffs would render business impossible. The plaintiff is entitled to judgment against Michael Shields without costs, but there must be judgment for the bank with costs.

Solicitors for the plaintiff · *Reynolds & Hoey.*
Solicitor for the Bank of Ireland: *John Malcolmson.*

W. L.

SHEEHY *v.* SHEEHY (1).

Appeal.
1900.
Oct. 31.
Nov. 1.

Mortgage—Portion of consideration illegal—Tippling Acts—
55 Geo. 3, c. 104, *s.* 15.

The circumstance that portion of the consideration for a mortgage consists of spirituous liquors supplied upon credit contrary to the provisions of the Tippling Acts vitiates the security only to the extent of the illegal consideration.

Case stated by Gibson, J., at the Cork Summer Assizes, 1900.

By order dated the 13th June, 1900, the County Court Judge of the West Riding of Cork dismissed an equity civil bill which had been brought to raise a sum of £56 on foot of a mortgage executed by Honora Sheehy, John Sheehy, Edmond Sheehy, and Ellen Sheehy as next-of-kin of Timothy Sheehy to Patrick O'Sullivan. This mortgage was afterwards transferred to the plaintiff (John J. Sheehy) who paid the full amount in good faith without notice of any infirmity in the transferor's title.

The consideration of the mortgage was made up of £25 due on an overdue promissory note made by the mortgagors, and £31 paid by O'Sullivan on the execution of the mortgage in cash. An unascertained part of the note represented drink supplied by O'Sullivan for consumption on the premises on credit in violation of the Tippling Acts. The amount did not exceed £1.

Gibson, J., affirmed the order, dismissing the suit, not, however, pronouncing any personal opinion, but at the request of counsel, stated a case for the decision of the Court of Appeal.

There were two questions—(1). Was the mortgage in whole or in part enforceable? (2). Was the order dismissing the suit right?

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(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

Bourke, *Q.C.*, and *Norwood*, for the appellant:—

If portion of the consideration for the mortgage is bad, that does not vitiate the whole, but only so much as contravenes the Tippling Acts, 55 Geo. 3, c. 19; 55 Geo. 3, c. 104. *Scott* v. *Gilmore* (1) is no longer law: it was ignored in *Philpott* v. *Jones* (2); *Cruickshanks* v. *Rose* (3); *Spencer* v. *Smith* (4); and *Gilpin* v. *Rendle* (5). The amount of the consideration coming within the Tippling Acts is merely void, and not illegal. It is only the void portion of the consideration that is irrecoverable: *Ex parte Bulmer* (6); *Webb* v. *Herne Bay Commissioners* (7); *Gaitskill* v. *Greathead* (8).

Conner, *Q.C.*, and *Sheehan*, for the respondent:—

The Tippling Acts not merely bar the remedy, but they destroy the right, and where a contract is illegal, a party to it cannot recover; *Smith* v. *Mawhood* (9); *Cope* v. *Rowlands* (10); *Burnyeat* v. *Hutchinson* (11); *Reilly* v. *Keirans* (12).

Nov. 1.

LORD ASHBOURNE, C.:—

We do not call on Mr. Bourke to reply, as we have had ample opportunity of making up our minds on the case during the course of the argument. The case does not involve very much in amount, but in principle it cannot be reduced to the sum of £1—the disputed item—because the defendant contends that the inclusion of the £1 invalidates the entire transaction. It appears that an equity civil bill was brought to foreclose a mortgage for £56 before Judge Bird, the County Court Judge for the West Riding of Cork, which included the sum of £1, the amount impeached. The original document is innocent on the face of it. It is simply a mortgage of certain lands by Mrs. Sheehy and others to Patrick O'Sullivan, a vintner in Clonakilty, to secure the sum of £56. O'Sullivan is not the plaintiff in the civil bill, because he assigned to John Sheehy, who paid the full amount in good faith, and without notice of any infirmity, and brought an equity civil bill to recover the amount of the mortgage. When the case came before Judge Bird, he held that from the way the £56 was made up, the equity civil bill should be dismissed. The £56 was composed of £25, the amount of a promissory note, and £31 cash advanced; but a sum which is to be taken as £1, included in the note, represented spirits sold upon credit. It was contended that invalidated the entire transaction, and that because the Tippling Act—or rather that section of it which had lived through all the Statute Law Revision Acts—provided that the price of spirits sold in less quantities than £1 upon credit was irrecoverable, that rendered the whole thing illegal. Judge Bird followed the decision in *Scott* v. *Gilmore* (1)—a judgment, not of Lord Mansfield, but of the Court of Common Pleas, composed of Mansfield, C.J., and of Heath, J., and pronounced in 1810. The marginal note states "A bill of exchange, part of the consideration for which is spirituous liquor sold in less quantities than of 20*s.* value, is totally void, though part of the consideration was money lent." The case was tried before Mansfield, C. J., at Nisi Prius, who non-suited the plaintiff. Serjeant Shepherd moved to set aside the non-suit, and for a new trial, and he contended that the money lent was a good consideration; and where a security was given for a good consideration and a void consideration together, that will not avoid the security *in toto*. Mansfield, C. J., in giving judgment said: "The statute does not in terms avoid the security, but it makes the consideration illegal, not merely void; and the security is entire, and cannot be apportioned; and since it is partly given for an illegal consideration, the whole bill is void." Heath, J., said, "Perhaps it might be different, if for part of the amount of the bill there were no consideration."

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(1) 3 Taunt. 226.
(2) 2 A. & E. 41.
(3) 1 Mood. & Rob. 100.
(4) 3 Camp. 9.
(5) Sel. N. P. 75.
(6) 13 Ves. 313.
(7) L. R. 5 Q. B. 642.
(8) 1 Dow. & Ry. 359.
(9) 14 M. & W. 452.
(10) 2 M. & W. 149.
(11) 5 B. & Ald. 241.
(12) 33 I. L. T. R. 59.

The County Court Judge was entitled to follow that decision, and he gave his judgment on the authority of that case, and if we thought it was good law, we should uphold his view. The matter then came before Gibson, J., on appeal last assizes, and he in deference to that case, and to the decision of the Lord Chief

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(1) 3 Taunt. 226.

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Lord Ashbourne, C.

Baron in *Reilly* v. *Keirans* (1), stated a case for this Court. The case stated sets out all the facts, and the questions submitted for our decision are:—1, Was the mortgage in whole or in part enforceable? and 2, Was the order dismissing the suit right?" I assume that Gibson, J., had before him the decision of the Chief Baron, and therefere he thought it best to state a case, without expressing his own opinion. *Reilly* v. *Keirans* (1) is a case of importance, as any decision of the Lord Chief Baron would be; it was decided by him on circuit at Monaghan, on appeal from the County Court Judge who had set aside a mortgage, whereby the plaintiff mortgaged certain lands to the defendant. The consideration in the mortgage was £20, and further advances, and it appeared that portion of the £20 was made up of drink supplied for consumption on the premises. Serjeant Dodd and Mr. Dickie argued that the consideration was not severable, and that, portion being illegal, the deed should be set aside. *Hill* v. *Fox* (2), and *Scott* v. *Gilmore* (3), and various sections of the Act of Parliament were cited. The short decision, as reported, is—"Palles, C. B., affirmed the decison of Judge Craig, and held, on the authority of *Hill* v. *Fox* (2), that portion of the £20 being for drink supplied on the premises, was illegal under 55 Geo. 3, c. 104, s. 15, as amended by 37 & 38 Vict. c. 69, s. 38, and vitiated the whole consideration, and consequently the deed must be set aside."

The question for us to decide is—Does the inclusion of a sum of £1 for drink supplied in the consideration of £56 vitiate the whole thing, or is it severable? If *Scott* v. *Gilmore* (3) is to be followed, we should adopt the reasoning of the County Court Judge, and follow his ruling, but I do not find that that authority has been accepted at all, or has become woven into the law of the country. I do not say it has been disparaged, but it has not been followed, and it has been practically departed from. *Cruickshanks* v. *Rose* (4) is not in accordance with it, and in *Spencer* v. *Smith* (5), Lord Ellenborough shook himsely loose from it.

Burnyeat v. *Hutchinson* (6) was an action brought to recover a tavern bill amounting to £1 13*s*., in which there was included

(1) 33 Ir. L. T. R. 59.
(2) 4 H. & N. 359.
(3) 3 Taunt. 226.
(4) 1 Mood. & Rob. 100.
(5) 3 Camp. 9.
(6) 5 B. & Ald. 241.

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an item of 8*s*. as the charge for spirits. The Court held that the portion of the bill, which represented the charge for spirits, could not be recovered, but that the incluson of this item did not vitiate the whole.

Applying these decisions to the present case, I arrive at the conclusion that the plaintiff should not be allowed to include in his security any portion of his demand, which consists of the price of spirituous liquors, ordered in smaller quantities than £1, that the sum of £55 is recoverable, and £1 only is not recoverable. The answer to the first question is—" Yes, to the extent of £55 "; the answer to the second question is in the negative.

FITZ GIBBON, L.J. :—

I proceed upon the assumption that this case is not, on its facts, within the Irish Act 9 Geo. 2, c. 8; that Act contains an express avoidance of securities for the payment of debts contracted in violation of its provisions, and different considerations arise when we have to deal with the effect of such an avoidance, where it applies to part of the consideration for a security. Here we have to deal with legislation which does not expressly avoid anything, but which is in effect prohibitive. What is prohibited? Plainly not the sale of spirits: the sale is not illegal, either in itself, or where the price is paid—sale of small quantities on credit is what is aimed at, and where this has been done, the recovery of the price is prohibited. With all deference for expressions to be found in some of the cases, I am not prepared to hold that there is any such prohibition of selling drink on credit as would make the act indictable; if anything is prohibited, or is made illegal, by a Statute, doing it must be a misdemeanour. I am not prepared to say that a publican who supplies drink without being paid for it, commits a misdemeanour, even though the Statute imposes a penalty, and enacts a disability, for so doing. I think that the Statute with which we are dealing is analogous, in its effect, and for our present purpose, rather to the Statute of Frauds and the Statutes of Limitations, than to a prohibitory Act, disobedience to which is a crime. It bars and takes away the remedy, but the transaction or contract is not made void. If a man orders drink and gets it, the publican thinking that he is going to get cash across the counter, the publican gives it at the risk of being unable to recover the price, but I cannot believe that he commits a misdemeanour. The sale is legal, but recovering the price is illegal; this construction of the law makes the punishment fit the crime, because it limits the illegality to the amount of the credit; and I think that it will reconcile most of the authorities, and will lead to a just result in this case.

If giving credit is illegal, it follows that any security given for the amount of the illegal credit is equally illegal. But the question remains whether such illegality necessarily vitiates the entire security, where part only of the consideration is affected by it. If the prohibition be what I think it is, namely, only a prohibition to recover the amount of the credit, this indiscriminate result will not follow. The part of the consideration which is good is severable, and full effect is given to the prohibition by preventing the recovery of so much as consists of credit illegally given. It is said that these Acts are based on a public policy to discourage tippling. On the contrary, they sanction tippling by any one who can "stand the shot." They even encourage the sale of drink on credit at high prices, or in large quantities, *e.g.* of a bottle of champagne at 21*s.*, or of two at 10*s.* 6*d.*, or of more than two quarts of whiskey at a time. Running into debt for drink, and not tippling in itself, is the mischief aimed at.

Spencer v. *Smith* (1) cannot be reconciled with *Scott* v. *Gilmore* (2). It is idle to suggest that they can be distinguished on the ground that drink for recruits was not within the Acts. Lord Ellenborough did not say so.

Securities given for the price of drink supplied on credit in violation of the Acts must be subject to the same infirmity as the original credit for which they were given. We can not hold a publican to be disabled from recovering the price of drink, but to be free to recover upon a security given for it. In my opinion, the plaintiff's claim, to the extent of the credit given for drink within the Tippling Acts, cannot be recovered; but those Acts vitiate or affect nothing more. In *Burnyeat* v. *Hutchinson* (3) the verdict was sustained for the amount of the tavern bill, omitting

(1) 3 Camp. 9.

(2) 3 Taunt. 226.

(3) 5 B. & Ald. 241.

the charge for spirituous liquors. In my own experience, on County Court appeals, in actions for the price of goods, and upon promissory notes, including the price of drink, the practice has been to deduct the irrecoverable items and to give decrees for the rest, and I think that this case should be decided in the same way.

Walker, L.J.:—

I only add a few words to express my view. There is a clear line of distinction between the sale of spirituous liquor, and recovering the price of it, when sold in less amount than two quarts. The prohibition in the Tippling Acts is not against the sale of spirits, but against the remedy for the sale. There is no provision enacting that the sale itself is illegal. I think the law and justice of the case will be satisfied by holding that the mortgage is not enforceable for such amount of the money as consists of the price of drink.

Holmes, L.J.:—

I concur; and if it were not for the decision in *Scott* v. *Gilmore* (1), and for *obiter dicta* quoted from judgments of Lord Tenterden and Lord Denman, the defendant's proposition would seem to me unarguable. When Abbott, C.J., in *Burnyeat* v. *Hutchinson* (2) said that an English enactment similar in terms to 55 Geo. 3, c. 104, section 15, contained "a general and absolute prohibition of the sale of spirits unless delivered in quantities" in excess of those specified, and when Lord Denman, in *Hughes* v. *Done* (3) adopted these words, those distinguished Judges must surely have overlooked the fact that the largest part of the publican's business is to sell spirituous liquors to be consumed at the time of sale on the publican's premises. Neither the law of England nor the law of Ireland has ever tried to prohibit members of the public from partaking of moderate spirituous refreshment at the bar, or in the parlour, of a public-house; nor has it sought to limit this privilege to such a seasoned toper as would require two quarts, or 20*s.* worth of liquor to quench his thirst. Subsequent legislation

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(1) 3 Taunt. 226. **(2) 5 B. & Ald. 241.** **(3) 1 Q. B. 294.**

has, I think, demonstrated that the proposition with which I am dealing is erroneous.

In the year 1874, the distinction between licences for the sale of intoxicating drink to be consumed on the premises, and licences for its sale to be consumed elsewhere had been long established; and the nature of the business carried on under the first mentioned class of business was as well known to the Legislature as to the man in the street.

The Licensing Act (Ireland) was passed in that year; and by its 38th section, the 15th section of the Act of 1815 was repealed, "except so far as the same applies to spirituous liquors which shall be used and consumed in the house, shop, or premises in which the same are sold."

The section is thus confined to a class of business which, if it is to be carried on at all must be carried on by the sale of drink in small quantities; and if such sales had been already prohibited. and were to continue to be prohibited, the elaborate regulations contained in this statute as well as in many previous enactments relating to this kind of trade would be not only unnecessary, but absurd. Turning from the language of Judges to the words of the section, I can find nothing in it to prohibit or render unlawful the sale of liquor in any quantity. Its object may have been, and probably was, to discourage drinking; but the method employed was to impede the toper in running a score. Whether he bought two quarts or two glasses of whisky, the sale was lawful, and passed the property; but if he did not pay for the smaller quantity at the time, and did not afterwards pay voluntarily, the publican could not recover the amount by action. I do not feel myself at liberty to introduce into an Act of Parliament any restrictions upon the dealings in a lawful trade beyond what is declared in its language, or to assume that any such dealings are unlawful unless they are prohibited expressly or by necessary implication.

In holding that an action cannot be brought for the price, but that there is nothing unlawful in the transaction itself, I am giving full force to the words of the section; and I think that similar provisions upon which a similar construction has been placed might be found without much difficulty.

For these reasons I am of opinion that *Scott* v. *Gilmore* (1) cannot be supported. At the same time, I cannot go so far as Lord Ellenborough did in *Spencer* v. *Smith* (2). If the publican cannot recover the price of the liquor as an ordinary debt, he cannot recover it in so far as it constitutes the consideration of a bill of exchange, or a mortgage debt. To allow this would seem to me to prevent what is expressly prohibited by the statute. Therefore, as between the mortgagors and original mortgagee, the mortgage ought to stand good only for the other sums due.

I should like to have further argument, or at least give the matter further consideration, if Mr. Bourke relies upon the fact that the plaintiff is an assignee for value without notice as entitling him to the whole amount. He did not, however, argue this very strenuously; and there is authority on the point of estoppel that has not been referred to. I believe, moreover, that Mr. Bourke is willing to have the mortgage debt reduced by the small sum that represents the price of the drink.

Solicitor for the plaintiff: *O'Donovan.*
Solicitor for the defendants: *J. F. Moriarty.*

R. D. M.

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(1) 3 Taunt. 226.

(2) 3 Camp. 9.

Ross, J.
1900.
March 27.

Appeal.
June 5.

In the MATTER of the ESTATE of BUNBURY, Owner; ROBINSON and FRY, Petitioners.

Practice—Land Judge's Court—Withdrawal of estate from sale to which the Land (Law (Ireland) Act, 1896, *applies, where an order under section* 40 *has not been made—Offers by tenants to purchase sanctioned at adequate prices—Lapse of time—Discretion of Land Judge—Appeal.*

An order for sale of an estate to which the Land Acts applied had been made in 1880 and a receiver had been appointed by the Court. In 1891 portion of the lands were sold, and the petitioners were paid off, the unpaid incumbrances consisting of a mortgage for a small amount and family charges. After the passing of the Land Act of 1896 an attempt was made to sell the remaining portion of the estate to the tenants; and on the 17th December, 1898, the estate was placed in the Land Judge's list under Rule 5, when the matter was adjourned to enable the owner to have an opportunity to raise money to withdraw the estate from Court. On the 1st March, 1899, an order was made by the Land Judge that the sale should proceed. Preliminary offers by the tenants to purchase their holdings were signed in October, 1899, the inspection by the Land Commission took place, and the Land Commission agreed to make the advance. In January, 1900, an application to sell under the 40th section of the Land Law (Ireland) Act, 1896, was made to the Land Judge, and this application had been repeatedly adjourned, as the owner was trying to take the case out of Court, and had been endeavouring to get the consent of the incumbrancers to that course being adopted, and no order was made under the section. Formal proposals were afterwards made by the tenants to purchase on the terms sanctioned by the Land Commission, which came before the Land Judge on the 27th March, 1900, when he accepted them. The owner appealed, seeking by his notice of appeal that the receiver should be discharged, and that upon the undertaking of the owner and the first mortgagee to pay any balance due to the receiver, and any costs chargeable on the estate, and upon the consent of all unpaid incumbrancers, the petition should be dismissed, and the order for sale discharged.

Held, by the Court of Appeal, that although in the absence of an order under the 40th section, the tenants had no *status* to compel acceptance of their offers, yet, under the circumstances of the repeated opportunities afforded to the owner, the lapse of time since the order for sale was made, the failure to obtain money to discharge outstanding incumbrances, and the adequacy of the prices offered by the tenants, the discretion of the Land Judge should not be overruled.

The conditional order for sale in this Matter was made on the 18th October, 1880, and the estate was then considerably encumbered. A Receiver had been appointed by the Court. In 1891 part of the estate was sold, and the petitioners were paid off. The remaining incumbrances consisted of a mortgage for £217, and family charges. One of these charges was a sum of £1000 charged on the estate in favour of a sister of the owner: this charge had been mortgaged, and the mortgagee was pressing for payment. After the passing of the Land Act of 1896 an attempt was made to sell the remaining portion of the estate to the tenants, but no order to sell under the 40th section had been made. On the 17th December, 1898, the estate was listed under the 5th Gen. Ord. to see if the 40th section applied, but it was adjourned to enable the owner to raise money. On the 1st March, 1899, an order was made that the sale should proceed. The preliminary offers to purchase were signed by the tenants on the 28th October, 1899. In January, 1900, an application to sell under the 40th section was made to the Court, and this application had been several times adjourned, the owner being anxious to take the case out of Court, and with that object had endeavoured to obtain the consent of the incumbrancers; but he had been unable to obtain the consent of the mortgagee of the charge of £1000. The inspection by the Land Commission took place, and on the 22nd February, 1900, the Land Commission agreed to make the advance. Formal proposals were then made by the tenants to purchase, which came before the Land Judge on the 27th March, 1900.

T. Pakenham Law, Q.C., for the petitioners.

A. F. Blood, Q.C., for the owner.

Ross, J.:—

This is a case in which I should have been happy to allow the parties to take the estate out of Court if that application had been made to me at the right time. But the estate has been in this Court for sixteen years. Nine years ago, in 1891, an arrangement

Ross, J.
1900.

In re BUNBURY'S ESTATE.

was made by which sales of portion of the estate were made to tenants through the Land Commission; but from that time till recently the parties did nothing to bring the estate to a sale. After the passing of the Land Act of 1896, the case of this estate came before me, and I directed the solicitors having carriage to go on, or to take steps to have the estate dismissed out of Court. They were ordered to proceed on the 1st March, 1899, and directed to negotiate with the tenants for a sale; they did negotiate with the tenants; the Land Commission sent down their officer, whose time is valuable, to investigate the premises and to make a report. Subsequently the Land Commission sanctioned the required advance. The receiver also was engaged in these negotiations. The chargeants and owner had notice of all this; they allowed the Court to act on the assumption that a sale was required. No hint was given that the estate could be taken out of Court. At the last moment, when negotiations for sale at a good price have been successfully concluded, I am asked to acquiesce in all this waste of public and private time and money. There was nothing to prevent the parties from taking the estate out of Court this time last year. They by their neglect induced the tenants to believe that a sale was to be had, and to arrange accordingly. Such treatment of tenants, who have behaved well, and treated the negotiations as entered into *bona fide*, would not merely be unjust in the present case, but would interfere with the operation of the Land Purchase Acts. I must accordingly direct the sales to proceed.

W. C. S.

Appeal.
1900.
June 5.

The owner appealed (1).

Blood, Q.C., for the appellant.

Brady, for the petitioner.

FITZ GIBBON, L.J.:—

This is an appeal by the owner from an order of the Land Judge dated March 27, 1900, accepting the proposals of certain tenants, declaring them the purchasers of their respective holdings for specified amounts of Guaranteed Land Stock, and ordering that the holdings be vested in the tenants in fee-simple, discharged of all superior interests. The owner by his notice of appeal asks that this order shall be discharged, and, instead thereof, that the Receiver shall be discharged, that on passing his final account his recognizances shall be vacated, the owner and first mortgagee undertaking to pay any balance which may be found due to the Receiver; that all proper costs when taxed shall be paid out of the money in Court; and, upon the undertaking of the owner and first mortgagee to pay any balance of such costs, and upon the consent of all the incumbrancers, that the petition shall stand dismissed, and the orders for sale shall be discharged.

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(1) In the Court of Appeal before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

The conditional order for sale was made on October 18, 1880, over nineteen years ago. The estate was then considerably incumbered; nine years ago part of it was sold, and the remainder is still in Court. Since 1898 repeated attempts have been made to carry out sales to the tenants, accompanied by threats of section 40 of the Land Law Act, 1896. No order to proceed under section 40 was ever made; but in January last an application to sell under that section was brought forward. There were several adjournments, because it was thought to be more advantageous to the owner and incumbrancers that the estate should be sold otherwise than under section 40. These proceedings took a course which, if not strictly logical or legal, is according to the practice, and is apparently convenient and useful. By this practice, when a tenant buys with money got from the Land Commission, the advance by the Purchase Department is sanctioned before the tenant makes a binding proposal. It is only after the Land Commission has agreed to advance the money that the tenant binds himself. The tenant and those who represent the landlord come to terms as to what the one will offer and the other will accept, sometimes after, sometimes before, they have ascertained how much public money they can get. The tenant then declares, in binding form, what he will give, and by the very same document he is declared to be the purchaser.

In the case before us the preliminary offer was signed on October 28, 1899. The inspection by the Land Commission then

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Fitz Gibbon, L.J.

took place, and on February 22, 1900, the Land Commission agreed to make the advance. Regular proposals were then made by the tenants, and these proposals came for the first time before the Land Judge on March 27, 1900. We desire to say, distinctly, that when a tenant has made a proposal in this form, though the sanction of the Land Commission to the advance has been given, and though all this has been done with the knowledge of the landlord, or of his agent, or of the Receiver, the Land Judge is not bound to accept it. When, under this complicated practice, these proposals came before the Land Judge on March 27, 1900, it was within his jurisdiction to refuse them, and he was at liberty even to consider whether a sale should take place at all or not.

Speaking for myself, I entirely lay aside any consideration that the negotiations or proceedings had conferred any *status* on the tenants enabling them to contend that the estate must be sold to them. The Land Judge had still power to take his choice between accepting the proposal of the tenants, and acceding to the proposal of the landlord. But the proposal of the landlord, to be accepted, must be complete and binding upon him; otherwise, the decision in *Harenc's Estate* (1) does not apply. In this case, for years, attempts had been made to prevent any sale. From 1898 proceedings towards a sale to the tenants had been from time to time put off; and the procedure under section 40 had been kept in reserve, as an alternative to selling otherwise. Mr. Blood, while contending successfully that the Land Judge was not bound to accept the tenants' offers, admitted that the offers before the Court were fair, and at a good price. *Harenc's Estate* (1) shows that the Court ought not to sell where the owner is entitled, and desires, to withdraw his estate from the Court. But to get into this position, the owner must show either that his estate is unencumbered, or that no incumbrancer has a present right to proceed to a sale. Here this is not the position. The landlord's proposal rests on a number of conditions being fulfilled, a number of undertakings being made binding, and a number of consents being given, which are, even yet, unmatured. There is no written or binding undertaking or consent from even the owner, and there

(1) 1 L. R. Ir. 242, 428.

is no security for its fulfilment, if it existed. We have nothing from the mortgagees, except that their solicitor has not appeared on the present occasion to oppose the appeal. The Land Judge had a mere offer of undertakings from the owner and first mortgagee to do certain things which, if done, might enable them to withdraw the estate from the Court. Ross, J., had the choice between accepting a complete and fair offer from the tenants to purchase, and letting the matter loose again upon the chance that the owner and first mortgagee would withdraw the case from Court, but the estate was still liable to be sold if any incumbrancer proceeded for a sale. He had jurisdiction to accept either alternative, and we can not reverse the order by which he chose the first.

As regards section 40, it does not apply to the case, because no order was ever made for a sale under that section; the adjournments and applications which occurred were made with the object of preventing section 40 from being brought into action, and a sale cannot be made under that section until the Judge has first made an offer to the tenants under it, and they have accepted the offer. That section does not apply until the Land Judge has taken the position of an offering vendor, and this stage was not reached in the present case, which, therefore, must be decided upon the law and practice applicable to ordinary judicial sales. Here the tenants had acquired no better *status* than that of any other intending purchasers.

Walker, L.J., concurred.

Holmes, L.J.:—

The decision of this appeal becomes clear when the position of the estate on the 27th March, the date of the order appealed from, is borne in mind. Part of the property was sold years ago; and on that day proposals to purchase the remainder after long delay and many postponements came for the first time before the Court. I do not think that the fact that these proposals were the result of long negotiations with the tenants, or the further fact that the Land Commission had consented to advance the purchase-money gave the tenants any right to have those proposals accepted. It was the duty of the Judge to consider all objections that might be made by the owner or incumbrancers, and only to accept the proposals if in the exercise of his judicial discretion he determined that to do so was for the interest of the parties who would be entitled to the purchase-money. It is admitted that the price offered was adequate, and that the lands could not be sold to better advantage; but the owner claimed that they ought not to be sold at all.

I am of opinion that the owner of an unincumbered estate is entitled down to the last moment to withdraw the estate from the Court, and to have the order for sale rescinded and the petition dismissed. I further think that the owner of an incumbered estate has the same right, if he is able to bring into Court sufficient money to satisfy the charges on it, and thus to convert it into an unincumbered estate. I should also be disposed to hold that if all persons interested in an incumbered estate were to agree to withdraw it from the Court, they ought to be permitted to do so up to the time of sale. In the present case, however, the owner is unable to show that he is within any of these classes. For upwards of fifteen months he had been endeavouring to obtain money to pay the incumbrancers; and the proceedings had been stayed three or four times to enable him to do so; but his efforts had not hitherto succeeded. I assume that most of the incumbrancers were ready to sign a consent to withdraw the estate from the Court; but, at least, one assignee of a family charge of £1000 insisted on payment; and the owner could not pay him. He was negotiating a loan to enable him to do so; but there was no guarantee that he would not fail on this occasion, as he had failed so often before. Therefore, the only thing he could ask the Court to do was to postpone the hearing of the application. Ross, J., thought that it was then too late for this, and accepted the proposals, to which there was no other objection. This was an exercise of discretion, which ought not to be interfered with on appeal; but if I am at liberty to offer an opinion, I may say that I can hardly conceive his coming to any other conclusion.

Solicitors having carriage: *William Fry & Son.*
Solicitor for the owner: *R. F. Barry.*

R. D. M.

BAGNALL'S TRUSTS.
FLYNN *v.* DALGLEISH.

M. R.
1900.
Dec. 10.

Trust fund—Policy of insurance—Security—Trustee and cestui que trust*—Addition to value of policy—Payment of additional premium by trustee out of his own money—Participating policy—Profits.*

A trust fund of £1000 was put in settlement on the marriage of T., who took a life estate therein. The trustees of the settlement, who had very wide powers of investment, lent the trust fund to T., who gave his bond and warrant of attorney, and contracted to insure his life for £1000. He also, by deed, directed and appointed that the trustees should, during his life, stand possessed of an annual rentcharge of £50 in the first place for the payment of premiums. No policy of insurance for £1000 was effected, but instead thereof there were two separate policies for £500 effected. One of the trustees of the settlement, out of his own money, paid for several years an additional £1 annual premium on one £500 policy, and thus converted it from a policy without profits into a participating policy, and so entitled to profits or bonus. After the death of T. there were profits or bonus to the amount of £326 paid in respect of this £500 policy:—

Held, that the sum of £326 representing profits or bonus did not belong *cestuis que trust* under the settlement of 1846, but went to the representative of the trustee who had paid the additional £1 annual premium.

SUMMONS.

By marriage settlement dated 10th March, 1846, and executed on the marriage of Timothy Bagnall with Margaret Brereton, the sum of £1000 was settled upon certain trusts during the lives of the husband and wife, and the survivor of them, and after the death of such survivor upon trust for the children of the marriage as the said husband and wife, or the survivor, should by deed or will appoint, and in default of appointment (which event happened) equally among such children as should attain twenty-one. The trustees of the settlement were by it empowered (with the consent of the husband and wife) to lend or lay out the trust fund "upon any description of private or personal security." After the marriage they lent this trust fund of £1000 to the tenant for life

Timothy Bagnall, and he purported to secure the repayment of the same by his bond and warrant of attorney for confessing judgment thereon conditioned for payment of £1000, and by contract to insure his life for £1000; and by deed dated 15th July, 1857, he directed and appointed that the trustees of the settlement should, during his life, stand possessed of an annual rentcharge of £50, which was also the subject of the settlement of 1846, for payment of the premiums on the policy of insurance, and after payment thereof and costs and charges to pay the balance to himself. This beneficial interest of Timothy Bagnall in the rentcharge was subsequently in 1862 by deed conveyed to Abraham Bagnall for the consideration therein mentioned. No policy of insurance for £1000 on the life of Timothy Bagnall was effected. A policy for £500 on his life was effected with the Legal and General Assurance Company in the names of Abraham Bagnall and William Brereton, the trustees of the settlement of 1846; and a second policy of insurance for £500 on his life was effected with the Alliance Assurance Company in the name of Abraham Bagnall alone. The premiums on these two policies of insurance were regularly paid by Abraham Bagnall till February 5th, 1862, and from that date till the year 1866 by a receiver appointed in a cause petition matter to have the trusts of a deed of 29th October, 1818, carried into effect. From that date the premiums on the policies were paid by Abraham Bagnall till his death in the year 1878, and afterwards by the executors and trustees of his will during the life of Timothy Bagnall. Prior to his death, in 1864, Abraham Bagnall applied to the Legal and General Assurance Company to convert the policy effected with them, which was a policy without profits, into a participating policy so as to become entitled to profits or bonus. The Company permitted him to do so on payment of a further premium of £1 per annum, and this annual payment of £1 was subsequently paid for a period of thirty-two years, by Abraham Bagnall out of his own money until his death, and afterwards by his executors. Timothy Bagnall died in January, 1896, having survived his wife. After the death of Timothy Bagnall the policy of £500 of the Alliance Assurance Company became payable, and the proceeds thereof were brought into Court in Ireland; and were by order of the Master of the Rolls

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dated May 8th, 1899, paid out to the plaintiff John Flynn and John Rochfort, who had been appointed new trustees of the settlement of 1846. The proceeds of the policy of £500 of the Legal and General Assurance Company, including profits or bonus, to the amount of £326, were brought into Court in England, and the sum of £845 5*s.* 11*d.* representing the same was, by order dated November 10th, 1899, paid out to the trustees on their undertaking to pay the costs incurred in the matter, amounting to £50 2*s.* 6*d.* This sum for costs was paid by the trustees, leaving a balance of £795 3*s.* 5*d.* in their hands.

The plaintiff as surviving trustee of the settlement of 1846 issued a summons for the determination of the questions arising in the case. The defendant Anna Maria Dalgleish was one of two children of the marriage of Timothy Bagnall with Margaret Brereton, who attained twenty-one. The defendant John O'Brien was the husband and personal representative of Catherine Bagnall who died intestate in 1892, the second child of the marriage who attained twenty-one.

The defendant John Shortt was the surviving executor and trustee of the will of Abraham Bagnall, deceased.

G. Y. Dixon, for the plaintiff.

M. Kehoe, Q.C., for the defendants Mrs. Dalgleish and John O'Brien :—

We are entitled to this sum of £326, representing profits or bonus on the policy of the Legal and General Assurance Company, subject to deduction of any money paid by Abraham Bagnall out of his own pocket. The bonus here is an accretion to the fund of £500, without which it could not exist. The profits spring out of the original policy or trust fund. This is a case of trustee and *cestui que trust*. The trustee converts a policy without profits into a policy with profits. He made use of his position as trustee to do so, and he cannot take any benefit for himself out of such a transaction. He is entitled to be recouped his expenses, but there his interest ends.

At the very least we are entitled to the full sum of £1000 and £5 per cent. interest in respect of the sum dedicated to the trust.

Matheson, Q.C., for the defendant John Shortt, the executor of Abraham Bagnall :—

This is not the case of a trustee attempting to gain some benefit for himself out of trust property. This policy of £500 was merely a security for the money put in settlement in 1846, and the *cestuis que trust* cannot claim anything more than £1000 minus the costs. The payment of the additional £1 per annum had the effect of increasing the value of the security, but the liability of the trustee was only to make good the trust fund. He is under no obligation to do anything further. Any surplus produced by payment of his own money belonged to Abraham Bagnall himself, and his representative is now entitled.

THE MASTER OF THE ROLLS :—

The question arising in reference to the settlement of March 10, 1846, owes its origin to a very wide clause authorising investments. By it the trustees are empowered " to lend or lay out the same upon any description of public or private or personal security," with consent. That would have authorised them to lend the trust fund on note of hand. What they did was what was inevitably to be expected. They lent it at once to the tenant for life, Timothy Bagnall, and he purported to secure the sum of £1000 to the trustees by a contract for a policy of insurance on his life. The mere giving of a policy for £1000 would not be any security in an ordinary case ; but he did give a good security in this way, that being entitled to an annuity of £50 arising out of lands under the settlement he charged it in favour of the trustees with the payment of the premiums on the policy, and after payment thereof and all costs and charges incident thereto, they were to pay the balance over to himself or his appointees. He therefore gave a good security though not a trustee's security. It has been suggested that no proof has been given that the necessary consent was obtained; but having regard to the lapse of time and the relationship existing between the parties, I must assume that consent was obtained. The transaction would otherwise have been little short of a fraud, and in the absence of proof after the lapse of half a century I cannot hold that there was any fraud or breach of trust. The proposed policy of insurance for £1000 was not effected, but instead two separate policies of £500 each were taken out. How that came about does not exactly appear; it was possibly divided between two insurance agents both pressing their claims. And so matters stood in 1857 when the transaction took place which is the ground of the present application. Timothy Bagnall died in 1897, and both the policies then became claims. Abraham Bagnall had in 1864 procured a modification in the terms of one of the £500 policies. He applied to the Company, and had it converted from being a policy of £500 without participation in profits into one with profits, at the additional premium of £1 per annum, and he or his executor paid this additional £1 for thirty-two years. Mr. Kehoe says that his representative is now entitled to get back this £32, but that his interest ends there. In any view he would be entitled to interest on each £1 paid for premium, as otherwise he would not be indemnified. The proceeds of this policy of £500, and £326 bonus or profits thereon, were paid into Court in England, and was represented by a sum of £845 5*s.* 11*d.* which was paid out to the trustees under order of North, J., less the sum of £50 2*s.* 6*d.* for costs which the trustees undertook to pay. Supposing then the policy were only security for the money put in settlement, can the *cestuis que trustent* claim anything more than the £500 minus £50 2*s.* 6*d.*? It has not been argued by Mr. Kehoe that the trustees could be made liable for the last-mentioned sum as not being a proper deduction directed by the Court and within its jurisdiction. If it had been the whole £1000 policy it would have been paid out less the costs, and there would have been a perfect discharge to the trustees for the entire fund. But, it is said that this policy stands on a different footing. It was originally a policy for £500, but became larger, amounting with bonus to £826; and thus the whole of this sum became subject to the trusts of the original £1000. The representative of Abraham Bagnall, on the other hand, says, "It is the payment for thirty-two years of my money that has converted the £500 into £826. Under the circumstances the increase is mine." And if this were an ordinary dealing, and there were no fiduciary relationship existing between the parties there is no doubt that this would be so. But Mr. Kehoe says, "this is a case of trustee and *cestui que trust.* The trustee found this policy without profits, and made it into a policy with profits. Granting that he is entitled to be recouped his expenses, still, he made use of his position as trustee, and so made a profit out of the policy which must go for the benefit of the *cestui que trust.*" By the settlement, the surplus, if any, was the property of Timothy Bagnall; that is, in the events which have happened, of Abraham Bagnall. The question is, how does this work out? If the policy, itself, as an ear-marked fund, had been put in settlement, and if the trustee had mixed up a fund of his own with the policy fund and, with the intention of benefiting himself had traded with it and made profit out of it, any profit so made would belong to the *cestui que trust.* But the fallacy of the contention is that in this case the money realized from the policy was not the settled fund—it was only the proceeds of a security for a definite sum of £1000—and the moment the £1000 was made good, the whole settled fund was made good, and the purpose for which the securities were set up was fully served, so far as the trustees of the settlement are concerned. Whether the representatives of Timothy Bagnall could have made a claim under the terms of the deed is not the same question. He was entitled to the surplus of the original policy (or policies) after providing the £1000. This is not the case where a trustee is trading with trust property and imperils the trust fund, where the rule is that he may be made responsible for every farthing he makes. Here the £32 was altogether the trustee's own money. He has in no way jeopardized the trust fund which is secured, and I am unable to see that he comes within the equity that has been invoked against him.

Solicitor for the plaintiff: *Bell.*

Solicitor for the defendants, Mrs. Dalgleish and John O'Brien: *Lynch.*

Solicitor for the defendant John Shortt: *Joseph Shortt.*

R. W. L.

In re LAMBERT'S ESTATE (1).

Appeal.
1901.
Feb. 21, 22.
26.

Power—Execution—Joint power of appointment given to father and son—Contingent sole power of appointment given to son if surviving—Covenant by son to exercise sole power—Subsequent exercise of joint power by father and son—Defective execution of power—Mortgage subject to certain charges "so far only as they affect the land."

By a disentailing deed, executed and enrolled in 1862, lands were limited to such uses as A and B, subject to the life estate therein of A, during their joint lives, should by deed appoint, and, in default of such appointment, to such uses as B, if he should survive A, should, after the death of A, by any deed made after the decease of A appoint, and, in default of such appointment, to such of the uses of a certain settlement as were subsisting before the execution of the disentailing deed, under which B took an estate tail.

In 1868, B, by a deed of arrangement with his creditors, covenanted that in case he survived A, and came into possession of the premises, he would grant and appoint the lands by way of mortgage to trustees to secure the sum of £2010, the aggregate sum due to his creditors.

In 1872, A and B, in exercise of their joint power, mortgaged the lands (A conveying his life estate therein) to the petitioners, it being stated in the mortgage that the security thereby created was to be subject to several charges, including the sum of £2010 secured by the deed of 1868 "so far as the same are now subsisting and capable of taking effect, and so far only as they affect" the lands.

In 1880, A and B, in further exercise of their joint power, by deed mortgaged the lands to M, subject to the charges mentioned in the schedule to the deed (which included the deed of 1868), but not so as to give the same, or any of them, any greater or other priority, lien, or security than they respectively had.

A having died in 1898:—

Held (reversing the decision of Ross, J.), by the Court of Appeal, that after the death of A the deed of 1868 took priority over the two mortgages of 1872 and 1880, though these latter deeds were executed under the joint power given to A and B.

Appeal by the creditors claiming under the deed of 4th July, 1868, against so much of the order of the Hon. Mr. Justice Ross, of 24th July, 1900, as postponed their charge upon the lands for sale in this matter to the charges created by several deeds mentioned in the said order executed subsequently to the said creditors' deed.

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(1) Before Porter, M.R., and Fitz Gibbon, and Holmes, L.JJ.

The facts and the contents of the several deeds upon which the question turned have been already stated (at p. 12 *ante*). In addition to the portions of the deeds set out in the report of the Court below, the attention of the Court of Appeal was directed to a covenant in the deed of 4th July, 1868, that the several creditors, parties thereto, would grant to Thomas Walter Lambert freedom from arrest, attachment, or execution against his person or estate. It should also be noted that by the mortgage of 20th December, 1872, John Walter Henry Lambert conveyed by way of mortgage to the mortgagees his life estate in the settled lands in addition to exercising the joint power of appointment conferred by the disentailing deed of 31st of October, 1862. This mortgage contained a reference to the creditors' deed of 4th July, 1868, not set out in the report below in the proviso for redemption, where the creditors' deed was referred to in precisely the same mode as in the preceding portions of the mortgage.

Serjeant Dodd, *Ronan, K.C.* and *Oulton*, for the appellants cited (in addition to the cases menttoned in the report in the Court below): *West* v. *Berney* (1), *Jones* v. *Winwood* (2), *Hole* v. *Escott* (3), *Re Hancock* (4), *Foakes* v. *Jackson* (5).

S. L. Brown, K.C. and *Dixon*, for the petitioners.

T. Pakenham Law, K.C. and *Cherry, K.C.*, for other incumbrancers.

The arguments were the same as in the Court below.

Feb. 26.

PORTER, M.R.:—

The question in this case depends upon the construction and effect of three not very complicated deeds; and as presented to

(1) 1 R. & M. 431.
(2) 4 M. & W. 653; 10 Sim. 158.
(3) 4 My. & Cr. 187; 2 Keen, 444.
(4) [1896] 2 Ch. 173.
(5) [1900] 1 Ch. 807.

us, is conversant, not with the validity, but solely with the priority of the interests which they purport to confer.

By deed of 31st October, 1862, Mr. John Walter Henry Lambert, who was tenant for life, and his eldest son Thomas Walter Lambert, who was remainderman in tail, disentailed the lands in question in the county of Galway (nothing turns upon the denominations) and resettled them, limiting them subject to John Walter Henry Lambert's life estate to such uses as John Walter Henry Lambert and Thomas Walter Lambert should from time to time during their joint lives by deed jointly appoint, and in default of such joint appointment as Thomas Walter Lambert, in case he should survive the said John Walter Henry Lambert, should by deed made after the death of John Walter Henry Lambert appoint, and in default of such appointment as therein mentioned.

In the year 1868 Thomas Lambert, the son, was in pecuniary difficulties: and compounded with his creditors by giving what was accepted as a security for their debts. This was done by deed of 4th July, 1868, whereby Thomas Lambert, the debtor, assigned to trustees a policy on his life for £2500, payable in case of his death during the lifetime of their father, the premiums being secured by a Mr. Christopher St. George; and the deed contained a covenant by the debtor, that if he should survive John Walter Henry Lambert, and become thereby entitled to and enter into possession of the lands he would, within one month thereafter, grant and appoint the lands to the use of the trustees, subject to redemption, on payment of the said sum of £2010 12*s.* 1*d.* and interest thereon.

This was of course a covenant by Thomas Lambert to exercise the second power contained in the deed of 1862, because that was the only power he could exercise alone. John Lambert did not join in the deed of 1868. He died in 1898. Thomas, his son, is still living. Thus the policy never became payable, and the creditors under the deed of 1868, can only rely upon the covenant to appoint, whatever its effect may be.

By indenture dated the 20th December, 1872, which contains a very full and correct recital of the deed of 1862, both John and Thomas Lambert exercised the joint power of appointment vested in them, so as to charge several sums amounting in all to £10,346 13*s*. 4*d*. and interest upon the same lands. No question of validity exists as to this deed. It is admittedly valid. The question is one simply of priority between it and the appointment of 1868, assuming the latter to be valid. The deed of 1868 is expressly referred to in that of 1872. It recites that the intended loan was to be made subject to several specified charges "so far as the same are now subsisting and capable of taking effect, and so far only as they affect the lands," and amongst the specified charges is expressly mentioned "the sum of £2010 12*s*. 1*d*. and interest thereon secured by an indenture of mortgage bearing date the 4th July, 1868, and made between the said Thomas Walter Lambert of the first part, Thomas Henshaw, John Brown Johnstone, and James Forbes of the second part, several creditors of the said Thomas Walter Lambert, whose names and seals are subscribed and affixed to the schedule thereto of the third part, and Christopher St. George of the fourth part." The lands are conveyed in the operative part subject, amongst other things, "to the said indenture of mortgage of the 4th July, 1868, and the sum of £2010 12*s*. 1*d*. thereby secured." And the same mortgage and debt are again mentioned in the same way in the proviso for redemption.

Then apart from priority, is the appointment of 1868 valid? It contains only a covenant to appoint when the donee of the power comes into possession of the estate: and no doubt in so far, it is irregular—the power being to appoint when the remainder, originally contingent, should vest in possession. It has, however, been held in numerous cases, in favour of a purchaser for value that a covenant to exercise a power, entered into by the donee before the time at which, on the strict letter of the instrument creating it, it could have been regularly exercised, will be treated as a valid appointment on the principle on which equity aids a defective execution. It is not necessary in the present case to do more than refer to such authorities as *Shannon* v. *Bradstreet* (1), *Jackson* v. *Jackson* (2), *Affleck* v. *Affleck* (3), and *Johnson* v. *Touchet* (1), because the respondents have admitted before us that the appointment of 1868 is a good appointment in the contemplation of this Court—their contention being that it is to be postponed to any charge created by an exercise of the joint power of father and son, and, therefore, to the mortgage of 1872.

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(1) 1 Sch. & Lef. 52. (2) 4 Br. C. C. 462. (3) 3 Sm. & G. 394.

Their argument is not devoid of plausibility. No doubt it appears that during the lifetime of the father and son they were to have a power jointly of charging or disposing of the remainder in fee after the father's life estate. But it is to be observed that this power would operate whether the son ever became absolutely entitled in remainder or not: that is, the father whose life estate was not the subject of any power (as such) and the son who might never have any estate at all, had a joint power of disposing of the fee. But the power conferred upon the son was one which would only affect his contingent remainder in the event of its becoming a vested estate by the happening of the contingency. There is, therefore, no reason why the two powers should not stand together. Any appointment made during the life of John under either power must operate in fact, if at all, on the death of the father—at which moment of time the joint appointment would confer a present right, and the separate power would also attach. This would lead to the inference that the appointments should take effect according to their respective dates.

But the main ground on which I think that the deed of 1868 ought to have priority over that of 1872 is founded on the principle that a man may not derogate from his own grant. But for the decline in the value of landowners' interests in land, probably this question would not have arisen. As it is, the same man, Thomas Lambert, who executed the deed of 1868 in favour of his creditors, joined with his father, four years later, in placing this charge of £10,000 on the estate. Without him it could not have been done at all. It operated, in the events which happened, on his estate, the very same estate which he had previously pledged by his deed. That he could do this there is no doubt at all. That he could do this so as to defeat his own previous deed for

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(1) 37 L. J. Ch. 26; 16 W. R. 71.

Appeal.
1901.
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value is a different question. I am clearly of opinion that he could not: in other words, he was under an incapacity, personal to himself, depriving him of the power of doing, or joining in, any act which would render his own previous appointment for valuable consideration nugatory.

This is a head of equity, consonant too with the common law in a great variety of cases—so consonant with justice and fair dealing that technical distinctions ought never to be allowed to encroach upon it. It is true that the donee of a power who appoints does not himself grant: that is not the legal effect of the transaction. But in substance it is the same. Here the appointments were solely for the benefit of the donee; that is for Thomas Lambert himself. Whether the transactions were carried out by exercising powers or by dealing with estates (as they might have been) ought to make no difference whatever, and to that effect are the cases.

In *Alexander* v. *Mills* (1) this principle was recognised and acted on: because the consent of the alienee of the estate was decided to be a condition to the exercise of the power by the donee; and in *Re Hancock* (2) the doctrine of derogation was held applicable to cases of powers as well as conveyances. It is suggested that as the first power is joint, there is no derogation in an exercise of it after a prior appointment by an individual who is one of the joint appointors. It is hopeless to justify this position on principle. Thomas Lambert was not capable of doing anything to defeat his own appointment; and the appointment of 1872 would of course have been inoperative without his concurrence; and if authority were wanting, it would be found in the case of *Hole* v. *Escott* (3), as to which case no answer that I have heard has been given.

I think it right also to refer to the very form and scope of the deed of 1872 itself, though my colleagues do not attach much weight to it. I have read the passages from it showing that the parties knew of the deed of 1868. I think these passages do more. I do not mean that they give or were meant to give any potency to that deed which it did not possess. If it was a void deed (as was,

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(1) L. R. 6 Ch. 124.
(2) [1896] 2 Ch. 173.
(3) 2 Keen, 444; 4 My. & Cr. 187.

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perhaps, suggested) the later deed would not set it up. But in considering what the deed of 1872 did, and what it purported to appoint, I think it clear that it did not appoint the whole estate in any event, but only the estate subject to the prior deed, that is, so much of the estate as would be left after deducting the sum secured by the deed of 1868, whether good or bad, just as if instead of dealing with money charged, it had appointed all the estate except a particular townland—supposed, erroneously, to be the subject of a prior alienation. But this ground is not necessary for my decision.

I have dealt with the case as if the deed of 1872 was the only one on which this question of priority arises. There are, however, several others later in date—as to which the same point is raised; but with one exception they are identical in form with, and must follow the fate of, the deed of 1872. In the appointment in favour of Mr. Cherry's client the deed of 1868 is not expressly mentioned, and therefore perhaps the observations I have made in reference to the recitals of that instrument in the latter deed do not apply. I think, however, that the ground on which I mainly rest my judgment does apply to that deed also.

We must restore the original priority fixed by the Examiner.

Fitz Gibbon, L.J.:—

I concur. The first matter to be determined is the effect of the creditors' deed of 1868. At its date Thomas Walter Lambert is correctly stated by Ross, J. to have had three distinct interests in the land—1. The present power of general appointment jointly with his father; 2. The contingent sole power of appointment not exercisable unless and until he survived his father; 3. The contingent estate in remainder arising upon his surviving his father, subject to any execution of either of the powers. The deed of 1868 fully recites the title, and contains an unqualified covenant by Thomas Walter Lambert within one month of his father's death to appoint all the lands, in exercise of the sole power, by way of mortgage, to secure the principal sum of £2010 12*s.* 1*d.* with interest at 5 per cent. I cannot doubt that this covenant from the moment of its execution affected and bound in equity every estate and interest vested, or contingent, which the covenantor then had or might thereafter have in the lands, and for this purpose a general power of appointment, being exercisable for the covenantor's benefit, uncoupled with any trust, and unaffected by any duty, is the same in equity as an estate. As a mortgage for value, it was an equitable alienation operating *in præsenti* upon every such estate and interest. It is perfectly settled that a covenant to exercise a power afterwards to arise, binds the lands automatically at the moment when the power arises, and it has this effect none the less when, at the date of the covenant, there is no estate yet in possession upon which it can operate as a legal charge.

Whenever the estate comes into existence, it does so, subject to the charge, and any and every subsequent operation by the covenantor upon his estate, whether such operation is or is not dated prior to the arising of the estate, must in equity be *puisne* to the charge which has already been created. The automatic attachment of the covenant to charge cannot be displaced by any subsequent act of the covenantor. The only exception would be a legal alienation by the covenantor, conveying or charging the legal estate to or in favour of a purchaser for value of a legal estate or charge, without notice of the prior equitable incumbrance, created by the covenant to charge. In postponing the charge created by the covenant in the deed of 1868 to the mortgages created by the subsequent exercise of the joint power of appointment, Ross, J., appears to me to have acted upon two distinct lines of argument, one founded upon general propositions, and the other upon his construction of the instruments in the particular case.

As to the first he seems to have thought that the covenant of 1868 had no effect at all upon the lands, unless and until Thomas Walter Lambert became, by his father's death, entitled to an estate in possession, or to speak strictly, to a sole general power of appointment exercisable *in præsenti.* I cannot accept this view. When V. C. Stuart in *Affleck* v. *Affleck* (1) states that if such a covenant is to have any effect at all it operates from the moment of its execution he is only stating the same principle which is to be found in *Coventry* v. *Coventry* (2), and in *Jackson* v. *Jackson* (3). The

(1) 3 Sm. & Giff. 393. (2) 2 P. Wms. 222. (3) 4 Bro. C. C. 462.

extent of the principle appears also in *Alexander* v. *Mills* (1), where it was held that the concurrence of the prior alienee was essential to the preference of a subsequent interest acquired by the execution of a power, and *Johnston* v. *Touchet* (2) is another example to show that, although the legal estate is at the time non-existent, a covenant to charge it *in futuro* has the immediate effect of disabling the covenantor from disposing of it in any manner inconsistent with the existence of a charge which he has bound himself in equity to create. No distinction appears to me to be possible between the effect of such a covenant to charge as against the execution of a joint power, and its effect upon the execution of a sole power by the covenantor. What he is precluded from doing is displacing the estate or charge which he has bound himself to create, and which equity treats him as having actually created. The disability to displace it by a sole act must apply equally to the displacement of it by an act in which he concurs with another person.

The second line of argument, based upon the dealings of the parties and the construction of the instruments in the particular case, appears to me to rest on mistaken assumptions and on an erroneous view of the intention and effect of the deeds. It appeared to Ross, J., "to be probable that the creditors thought that sufficient interest in the estate would remain in the son, independent of the exercise of the joint power of appointment, to satisfy the amount of their claim under the deed of 1868." This appears to me to be in the last degree improbable. Nothing short of an express reservation by the covenantor in the deed of 1868 of his right to exercise the joint power, would lead me to attribute to the creditors the intention to accept a security subject to future executions of that power. The power was unlimited and general. If capable of being exercisable at all so as to postpone the charge created by the creditors deed, it must have been exercisable to the extent of alienating the whole estate, or even of appointing the whole of it to the covenantor himself or to his assigns, so as completely to defeat the deed of 1868: I go so far as to say that the intention which Ross, J., attributes to the creditors is repugnant to their acceptance of that security.

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(1) L. R. 6 Ch. 124.

(2) 37 L. J. Ch. 26; 16 W. R. 71.

On the other hand, the express recital of the creditors deed in the subsequent deeds executed by father and son in exercise of the joint power, the express declaration in several of those appointments that they were subject to the creditors deed so far as it was capable of taking effect, and the admission that all those who now claim through subsequent exercises of the joint power had express notice of the creditors deed, demonstrate to my mind that not the creditors, but the subsequent appointees, took their chance that sufficient interest in the estate would remain independent of the deed of 1868, to satisfy the amount of their claims. Lastly, the qualification contained in several of the subsequent deeds, *e.g.* in the deed of December, 1872, limiting the prior operation of the deed of 1868 by the words "so far only as it affected the lands," seem to me to amount to an express declaration that whatever effect equity could give it it was to have. Its effect in equity I have already discussed, and I can give it no other or less effect than that of disabling the covenantor from putting any charge or incumbrance upon the lands, or creating any estate or interest therein, in priority to the charge which he had bound himself to create as of the date July 4, 1868, in favour of his creditors.

For these reasons, without entering into any of the considerations arising upon the subsequent bankruptcy of Thomas Walter Lambert, or upon any of the other arguments addressed to us in the same direction, I hold that the incumbrance under the deed of 1868 must take its place upon the schedule above all the mortgages created by the subsequent exercises of the joint power by father and son. In form we must discharge the order appealed from, in so far as it displaces the priority in order of date of the deed of 1868, and in lieu thereof we must declare that that deed and the several deeds executing the joint power, and also the deed of 15th May, 1880, said to be an execution of the sole power, are entitled to priority as incumbrances in the order of their respective dates, and that the schedule of incumbrances and the order for the application of the rents and property by the receiver must be varied accordingly. To avoid the expense and delay of going back to the Land Judge to have our declaration formally carried out, the parties should, I think, amend the order and schedules in accordance with our judgment, and may prepare a

Fitz Gibbon, L.J.

minute which can be settled here. The order appealed from gives the several parties their costs below with their several demands. We do not disturb this part of the order. The appellants must have their costs of appeal also with their demand, and the party having the carriage will have his costs here (one set only), as part of his costs in the matter. He represents all the other incumbrancers, and they must severally abide their own costs in this Court.

Holmes, L.J.:—

When there are eliminated from the discussion of this appeal certain propositions which have been established by binding authorities and which were not disputed during the argument, there remains, as far as I can see, only one point for decision. Previous to the execution of the deed of 1868, Thomas William Lambert had been arrested under a writ of *ca. sa.*, and had presented his petition as an insolvent. It would have been in the power of his creditors to have insisted as a condition to his discharge from custody that all his property, real and personal, should be vested in the assignees of the Court; and it is well settled that if this had been done, he would have been unable to join his father in executing the power of appointment conferred on them by the disentailing deed of 1862 as long as his property was so outstanding.

Under these circumstances, it was for the interest of both the insolvent and his creditors to enter into the arrangement that was carried out by the deed of 1868. The creditors who would have nothing in the event of the insolvent predeceasing his father, had £2500 secured to them in all events by the policy of assurance, while the son was left at liberty to make the best bargain he could as a condition to his concurring in a joint appointment of what would still be a valuable property after providing for the payment of his own debts.

There is no doubt—indeed it has been admitted by the respondents' counsel—that the covenant in the deed of 1868 by Thomas Walter Lambert that he would, in case he should survive his father, appoint the property in the manner provided, so as to make it a security for the payment of his debts would, upon the happening of the stipulated event, be a valid execution of the power of appointment conferred upon him by the disentailing deed. It is, I think, equally clear that *prima facie* and in the absence of special circumstances, this covenant would carry with it an obligation on the part of the covenantor not to destroy or derogate from the value of the security by any subsequent voluntary act. It is conceivable, although highly improbable, that the parties contemplated that Thomas William Lambert was not to be restrained in any way by this covenant from exercising the power of appointment given to himself jointly with his father, and that the two acting in conjunction might thus be able to render the security given to the creditors absolutely valueless. But I cannot assume the existence of this intention without evidence of it; and no such evidence is to be found either in the circumstances that led to the execution of the deed or in its language and provisions.

I am not aware that there is any controversy up to this point. I believe that the foregoing propositions, if not expressly admitted, have not been disputed; and it is therefore unnecessary for me to elaborate them by reference to authorities or by minute examination of the instrument. Counsel for the respondents, however, have argued that special circumstances are to be found in the disentailing deed under which the two powers of appointment are derived. This deed, it is said, represents a bargain between the father and son; and it must be assumed that the father whose assent was a necessary condition to the barring of the entail, became a party to it upon the express terms that during the continuance of his life estate he and his son should enjoy a joint power of appointing the premises to such persons and in such way as they might think right. It is further said that an obligation by the son either by express covenant not to join in exercising this power or by entering into an undertaking inconsistent with its exercise would be void as being in violation of the terms of the bargain with his father.

I accept the proposition that the joint power of appointment was a term of the agreement to bar the entail; but there is nothing to lead me to believe that it was not to be subject to the contingencies incidental to such a power. One of these is that either of the donees may persistently refuse to exercise it; another is that he may bind himself for valuable consideration not to exercise it. He might bargain with his father for some benefit for himself in return for joining in an appointment; and I see no reason for his not being at liberty to make a bargain with a stranger to refrain from appointing either altogether or to a certain extent. To do this would not be a fraud on any one. Again, I appeal for the terms of the contract to the instrument itself, and I am unable to find therein anything to support the contention of the respondents. The words which are—" in default of such joint appointment, and so far as any such appointment shall not extend," are a common form of conveyancers; and simply mean—" so far as there is no valid and effectual joint appointment." I asked if the same powers of appointment had been given in the same language by a will or by voluntary grant, would the remainderman be at liberty to covenant not to exercise the joint power, and the answer was in the affirmative. But if that be so, upon what principle of construction can I give a different effect to the language of the disentailing deed ?

For these reasons, I am of opinion that since the deed of 1868 was executed, Thomas William Lambert could only join in exercising the joint power subject to its provisions, and that therefore the charge created thereby takes priority to the mortgagees represented by the respondents. I attach no importance to the fact that all or some of the mortgages are made subject to the charge created by the indenture of 1868 so far as the same was then subsisting and capable of taking effect. This gives notice of the prior incumbrance to the mortgagee; but it does not place him in a better or worse position than he would have been in if the words had been omitted. If he can show by application of legal principles that the creditors' deed does not take priority, the reference to it does not affect him ; and it confers on him no benefit if he would otherwise be *puisne* to it.

For these reasons, I hold that the appeal ought to be allowed.

Solicitor for the appellants : *J. Rose Byrne.*
Solicitor for the petitioners having carriage : *J. A. French.*
Solicitors for Miss M'Causland : *Reeves & Sons.*
Solicitors for other mortgagees : *Blake & Kenny.*

G. Y. D.

Appeal.
1900.
May 7, 8.
June 27.

O'REGAN, Tenant; TRENCH, Landlord (1).

Landlord and tenant—Land Law (Ireland) Act, 1881, *sect.* 48, *sub-sect.* 4—*Land Commission—Jurisdiction—Fair rent—Power to refer to Court valuers—Court valuers' report—Right to examine Court valuers as to principle on which their valuation was made—Bias and prejudice.*

On the hearing of an appeal from an order of the County Court fixing a fair rent, counsel for the landlord objected to the report made by the two Court valuers being received by the Land Commission, on the grounds—(1) That the reference was made to two valuers, while sect. 48 of the Land Law Act, 1881, only contemplated a reference to one; (2) that every independent valuer is bound to rely on his own skill and knowledge, and in this case they were furnished with a copy of a report of the Court valuer in the County Court to assist them in making their report; (3) that the valuers were not independent valuers because they had previously been employed as Assistant Commissioners; (4) that there was no power to refer to the valuers except on a question arising in the course of the hearing:—

Held, that the reference to two Court valuers was legal, and that these objections were untenable.

Counsel for the landlord also offered evidence for the purpose of showing that the Court valuers' report should not be received on the grounds—(1) That they had been in the habit of valuing land on erroneous principles; (2) that they had shown bias and prejudice against landlords generally:—

Held, reversing the decision of the Land Commission (Walker, L.J., *dissentiente*), that such evidence was admissible.

Case stated by the Irish Land Commission. The decision governed a number of cases, which had been consolidated for the purpose of having the question decided, and so the facts of the first case alone are given. It was an appeal from an order of the County Court Judge of the county of Limerick, dated the 15th January, 1898, by which it was ordered that the fair rent of a holding in the county of Limerick, held by Ellen O'Regan, from Louis Trench, containing 42a. 0r. 18p. should be fixed at the sum of £38 for a second statutory term. Notice of appeal from this order was duly given. In accordance with the usual practice of the Court, and acting under section 48, sub-section 4, of the Land Law (Ireland) Act, 1881, some time after the notices of appeal were lodged, and before the appeal came on to be heard, the Land Commission referred a number of matters relating to the holding to Messrs. John Bomford and Thomas M'Afee as independent valuers, and desired them to visit the holding and inspect and value the same, and to report to the Land Commission their opinion on the several matters set out in the form issued for that purpose by the Land Commission on the 26th April, 1899. Messrs. Bomford and M'Afee having, in accordance with the usual practice, notified their intention to visit and inspect the holding, the landlord's agent objected to any report being made by Bomford.

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(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.

Messrs. Bomford and M'Afee both hold office as Assistant Commissioners of the Irish Land Commission; some of these gentlemen act as members of the Sub-Commission Courts, some act as valuers in cases under the Purchase of Land Acts, and others act as Court valuers, to report under the 48th section in reference to valuation of holdings in appeals before the Land Commission. Messrs. Bomford and M'Afee had been selected as Court valuers, and their whole time had for some years past been occupied in valuing as Court valuers, under sect. 48, but the Land Commission had power to direct them while they continued in office to act as members of Sub-Commissions, or to discharge duties under the Purchase of Land Acts.

Before visiting the holding in the case, Messrs. Bomford and M'Afee, in accordance with the usual practice were furnished with the originating notice, certificates of the Poor Law Valuation, the order appealed from, and the schedule attached thereto, the map referred to therein, and notices of appeal. They visited and inspected the holding on the 21st September, 1899, and they duly reported their opinion upon the matters referred to them.

The case came before the Land Commission at Limerick, on the 2nd November, 1899, when counsel for the landlord requested the Land Commission not to receive or act upon the report of the valuers on the following grounds:—

1. Because the Court has no power to refer any question

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relating to a holding under section 48, sub-sect. 4, of the Land Law (Ireland) Act, 1881, to more than one valuer.

2. Because an independent valuer making a report to the Land Commission in pursuance of said section is bound to rely solely upon his own skill and knowledge, and not upon the opinions of others; and because the valuers in this case were furnished with a copy of the report of the Court valuer in the Civil Bill Court with a view to assisting them in making their report.

3. Because neither Mr. Bomford nor Mr. M'Afee, who made the report, was an independent valuer within the meaning of the section, inasmuch as

(*a.*) They both are and have been employed for many years as Assistant Commissioners to the Irish Land Commission.

(*b.*) As such Assistant Commissioners they have been in the habit of valuing land upon entirely erroneous principles.

(*c.*) They had each of them shown bias and prejudice against landlords generally so as to render them incapable of acting with independence in any particular case.

Evidence, in support of the third ground of objection, was tendered on behalf of the landlord of statements made by Messrs. Bomford and M'Afee, before a Committee of the House of Commons, with a view to showing (as alleged) that they were in the habit of valuing land upon erroneous principles, and that they had shown bias and prejudice against landlords generally, so as to render them incapable of acting with independence in any particular case. The Land Commission were of opinion that this evidence was not legal or admissible, and they refused to receive it. The Land Commission were also of opinion that they were not bound in law to accede to any of the other requisitions of the landlord's counsel. They were of opinion that they had acted within their statutory powers in making a reference for report to more than one valuer. They were of opinion that they acted within their statutory powers in furnishing the Court valuers with the order of the County Court Judge and schedule attached thereto as aforesaid (being the document referred to in counsel's requisition as the report of the Court valuer in the Civil Bill Court), and that the Land Commission did not thereby relieve the Court valuers from their

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obligation as independent valuers to rely, and were of opinion that they did in fact rely, solely upon their own skill and knowledge, and not upon statements as to the opinion of others. The Land Commission were of opinion, that the fact that Bomford and M'Afee held warrants as Assistant Commissioners as aforesaid, and had acted as lay Assistant Commissioners, did not disqualify them from acting as independent valuers, but (on the contrary) that while they continued to hold such warrants the Land Commission were justified in selecting them as Court valuers, and in assuming and relying upon their skill, integrity, and independence, and were of opinion that they could not legally enter, and ought not to enter upon a public inquiry in the manner suggested as to their conduct and capacity while acting as Assistant Commissioners or otherwise. The Land Commission accordingly declined to accede to any of the requisitions of the landlord's counsel, and stated their reasons in a written judgment. After considering all the evidence heard by them, and the report of the valuers, the Land Commission amended the area to 41A. 2R. 18P., and on such amended area fixed the judicial rent at the sum of £36 2*s*. The case is reported in Mr. Fitz Gibbon's Land Cases, vol. 5, p. 18.

At a subsequent sitting at Armagh, a number of cases came before the Land Commission for re-hearing on the estates of the Duke of Manchester and the Earl of Gosford. The same course was adopted with regard to them, the Court valuers being Messrs. Moroney and Caldwell. In the cases on the Gosford estate the landlord's agent protested against valuations being made by these gentlemen. When the cases came on for re-hearing the same objections were made by the landlord's counsel, who also relied on the further ground of objection that there was no power to refer any question to an independent valuer except one arising in the course of the hearing of a case before the Land Commission.

Following their decision in *O'Regan* v. *Trench* the Land Commission over-ruled the objections, but agreed to state a case for the opinion of the Court of Appeal. The questions for decision were:

1. Whether the Land Commission were bound in point of law

to refuse to receive or act upon the Court valuers' reports on any of the grounds of objection taken by counsel for the landlords?

2. Whether the Land Commission were bound in law to receive the evidence tendered as regards Messrs. Bomford and M'Afee in the case of *O'Regan* v. *Trench*?

Campbell, Q.C., and *Cherry, Q.C.*, for the landlord.

E. Cuming and *Megaw*, for the tenants.

June 27.

LORD ASHBOURNE, C.:—

This case comes before us on a case stated by the Land Commission, and we are asked to answer two questions:—

(1). Whether the Land Commission was bound in point of law to refuse to receive or act upon the Court valuers' reports on any of the grounds of objection taken by counsel for the landlord;

(2). Whether the Land Commission was bound in law to receive the evidence tendered as regards Messrs. Bomford and M'Afee.

Practically, all the grounds of objection referred to in the first question have been already discussed in this Court in the case of *The Queen* (*Earl of Gosford*) v. *The Irish Land Commission* (1), and I see no reason in any of the arguments addressed to us to induce me to think that the decision we then gave was not perfectly correct, and one that in this case should not be adopted and reaffirmed. I do not think any of the grounds of objection are valid. They seek to upset what has been the practice of the Land Commission for a considerable time, and I can see no reason why any of the grounds of objection could in point of law be upheld. I cannot see that the power conferred by the 48th section of the Irish Land Act of 1881 was exceeded, or that the fact that the valuers held the position of Assistant Commissioners prevented them from being independent—being entirely unconnected with the previous decision and with the parties.

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(1) [1899] 2 I. R. 399.

I therefore think that the first question should be answered in the negative.

The second question relates to the rejection of certain evidence in the case of *O'Regan* v. *Trench*, tendered "with a view to showing that the two valuers were in the habit of valuing land upon erroneous principles, and that they had shown bias and prejudice against landlords generally so as to render them incapable of acting with independence in any particular case." The evidence suggested was statements made by the valuers before a committee of the House of Commons and elsewhere. The committee of the House of Commons was that commonly known as the Morley Committee which sat some six years ago. The Land Commissioners appear to have entirely refused to allow any evidence of any kind to be given on the subject. I could well understand the Land Commission refusing to receive evidence of the statements of these valuers before the Parliamentary Committee, or of their own previous decisions as Assistant Commissioners, or of anything not brought into some kind of contact or connection with their conduct in the particular case. But it is impossible to say from the case that all the evidence tendered would have been presented in an illegal form or been worthless. We have no means of knowing in what precise form or shape the evidence was offered or was intended to be offered. Although, however, I am disposed to think from the way the case is stated that it is possible the greater part of what is suggested might not have been admissible, I cannot lay down as matter of law that all evidence of the kind—no matter how pointed or directed—was necessarily inadmissible. Evidence might be tendered clear, precise, and definite, connected with the very case, or pertinent to the action of the valuers in relation thereto. Such evidence could not be said to be inadmissible, and therefore I feel bound to answer the second question in the affirmative.

Fitz Gibbon, L.J.:—

I concur with the Lord Chancellor that the Court must answer the first question upon the special case in the negative, and the second question in the affirmative. But I must state the reasons for giving these answers, and I must explain what I understand to be their meaning scope and effect, for myself alone. The negative answer to the first question may be found already given in the judgments of this Court in the *Gosford Case* (1). The affirmative answer to the second question appears to me to be inevitable if the principles of the law of evidence, of our jurisprudence, and of natural justice, are to be applied to the reports of valuers under the Land Acts. At the outset, however, I must distinctly say that our decision upon the admissibility of the evidence offered as regards the gentlemen named in the case, neither conveys or implies any reflection whatever upon their character, conduct, or capacity. Nor does it decide that if any of the proposed evidence had been brought to the point of being actually tendered, it would have been admissible, or would have amounted to legal evidence at all. I am forced to give the negative answer by the generality of the terms in which the case states the character of the proposed evidence, the issues to which it was addressed, and the grounds of its rejection. The description of the evidence offered is wide enough to include admissible evidence; the issues stated are relevant to the legality and propriety of the valuers reports, and the grounds of rejection are not sustainable to the full extent which the words of the case are capable of covering. The rejection which a negative answer would declare to be right might exclude *some* legal evidence, and therefore we must answer in the affirmative, though, in the particular case, the stage had not been reached of tendering any particular piece of evidence in the shape, or with the conditions, or under the circumstances necessary to make it legally admissible.

It must be understood, when the case goes back to the Land Commission, that we are not to be taken as having decided that any particular question is legitimate, or that any particular piece of evidence must be received. We decide only that *all* evidence tendered upon the issues stated in the case can not be indiscriminately rejected upon the general grounds mentioned.

This case is stated under the Act of 1881, section 48 (2). Under this section, the Land Commission cannot state, and we

(1) [1899] 2 I. R. 399.

cannot deal with, anything except a question of law arising in a pending proceeding. We must take the facts exclusively from the case, and we must construe it according to its own terms, neither explaining, limiting, nor extending its meaning by reference to any extrinsic matter. We must lay aside all the statements of counsel as to the practice and the procedure of the Land Commission, and decide the abstract questions of law upon such facts only as appear on the case itself.

An answer to the first question to the effect that the Court valuers Reports must be rejected as illegal, was claimed upon four grounds. I shall answer each of these as shortly as I can, though the answer may be found already given in *Gosford's Case* (1). The first point is that the reference was made to two valuers, and that the Act of 1881, section 48 (4), authorised a reference to only one. I am willing to admit that the Legislature contemplated the employment of a single valuer, and that under the corresponding section 32 of the Act of 1887, a County Court Judge could not call for a report from more than one. I am not satisfied to rely, as Meredith, J. did, on the Act (52 & 53 Vict. c. 63 section 1), which provides for reading singular for plural or plural for singular in certain cases. I doubt that a valid order could be made under section 48 (4) imposing the additional costs of a joint report upon the parties. I uphold the legality of obtaining the opinion of two valuers upon a higher ground than the continuance of the practice for a long time. The Act empowers the Land Commission to obtain expert assistance in the shape of a report, and to act upon it. The report is none the less the opinion of an independent valuer because two concur in it. In such matters "two heads are better than one," the joint opinion of two experts is more valuable and more likely to be right than the opinion of one, and, so long as the parties are not asked to pay for it, they have no legal right to object to the Land Commission having obtained a joint report in preference to a single one. I can understand, and to some extent sympathise with the objection to having a property subjected at all to the appraisement of experts whose occupation might be gone if

(1) [1899] 2 I. R. 399.

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rents were not reduced, but an objection to two instead of one is quite unreal.

The second ground of objection rests on an assumption which no one denies, that every valuer is "bound to rely solely upon his own skill and knowledge, and not upon statements as to the opinion of others." We can not question the statement in the case that the valuers have in fact always done so. It does not follow that because they were furnished with the report, of the previous valuer or of the Sub-Commission, they relied upon these to the exclusion of their own skill and knowledge, or in breach of their duty to form an independent opinion. So far as this objection insists upon the Court valuers going *de novo*, and all over again, through the details of the work, it is a mischievous objection. So far as it insists upon the duty to form an independent opinion, no one disputes it, and the case states that everything possible has been done to secure the performance of the duty. As a means of obtaining a satisfactory report, all available information should be supplied, and, having regard to the nature of the reference, information as to what was previously done might be especially valuable. The whole object of the re-hearing is to correct the previous conclusion upon the same subject. Though the Land Commission must decide the case, and must pronounce its own judgment on its own responsibility, the knowledge of what was objected to is a help, and not a hindrance, to a better conclusion. The same remark applies even more forcibly to the Court valuers. Experts are more prone to differ than to agree, and an expert who is told what others have done or said is more likely to avoid mistakes of his own, and to come to a right conclusion, if he is examining the work of others, than if he is travelling over the ground alone, without knowing how others have fared that way before. We have an illustration here, where every appeal is a re-hearing. We do not rely on the decision of the Court below, in any sense that prevents the decision of this Court from being our own. But we derive assistance of the highest value from the judgments which it is our duty to review. A client who has got an opinion from counsel with which he is not satisfied, or a patient who distrusts his doctor, is a fool for his pains, if he consults a second professional man without

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letting him know what the first thought of his case; always assuming, as we are bound to assume, that each honestly does his duty.

The third point, that Assistant Commissioners, having been employed as such, are not "independent valuers" within the meaning of the Act, is equally unfounded. "Independent" means disinterested and independent of the parties; it also conveys that the opinion given must be independent, *i.e.* the honest opinion of the man himself. It cannot mean that he is to be independent of the Land Commission, for the Land Commission is to employ him. The work of an Assistant Commissioner is so similar to that of a Court valuer that experience in the one capacity is the best qualification for the other, and the case in effect states that the best Assistant Commissioners are promoted to be Court valuers. The Act of 1887, section 32, expressly enacts that, "for aiding the County Court Judges, the Land Commission may from time to time, but subject to the approval of the Lord Lieutenant, nominate *independent valuers* who shall be paid such remuneration as the Treasury may determine." The mode of selecting and appointing the Court valuers, as stated in the case, should tend to make them more independent than if they were employed on other terms.

The last objection is that there was no power to refer except on a question arising in the course of the hearing. To yield to this could cause nothing but delay and expense. The questions upon which the Court valuers report arise in every case, and the practice of making the reference in anticipation of the hearing saves a useless sitting for the purpose of formally raising and referring these questions, and then adjourning until the report has been received. Putting forward such an objection savours of perversity.

The answer to the second question is a much more difficult matter, and requires careful explanation. If I could read the question as being confined to specific evidence actually tendered to impeach the character or conduct of Messrs. Bomford and M'Afee, I should answer it in the negative. But I cannot do this, and a much wider and general issue has been raised and argued, both before the Land Commission and here. The grounds of objection are thus stated in the case—(1). That as Assistant Commissioners the gentlemen named have been in the habit of valuing land upon entirely erroneous principles. (2). That they had, each of them, shown bias and prejudice against landlords generally, so as to render them incapable of acting with independence in any particular case. To these issues a party interested must, "in point of law," be permitted to address evidence, unless Assistant Commissioners are above the reach of ordinary law. The valuation of land is an operation which must be conducted on ascertainable principles, which involves the determination of difficult questions of law and of fact, and which requires technical knowledge, skill, and experience. It is the duty of the Land Commission to lay down and to act upon sound and definite principles in fixing fair rents; and before it can adopt the report of a valuer, it must be satisfied that he has acted on such principles. If a principle is challenged, the Land Commission must decide whether it is right. If a valuer is alleged to have acted on an erroneous principle, the Land Commission must ascertain whether he has or not, before it adopts his opinion, and no legal evidence tendered to prove that in any particular case an Assistant Commissioner acting as a Court valuer has acted upon erroneous principles can be rejected.

Bias and prejudice, however improbable, are possible, even in an Assistant Commissioner, and, if proved, would be fatal to his report. The improbability of bias or prejudice can not make the issue irrelevant when raised, nor make evidence inadmissible "*in point of law*," which is all that we have to do with. The Land Commission can not indiscriminately refuse to receive such evidence, but it can and it ought to require the party who makes the charge to state specifically what evidence he tenders. It is only when so tendered that it can be decided whether it is legal evidence or not. According to the special case, that stage was not reached here. There was a categorical refusal to allow *any evidence at all* to be given upon the issue, either of the principles of valuation adopted by Messrs. Bomford and M'Afee, or of their having shown bias or prejudice as alleged. The description of the class of evidence which counsel tendered is capable of including legal evidence, and therefore the absolute refusal to receive evidence can not be upheld in law. The description of the first class of evidence tendered and rejected is in these words:—"Statements made by Messrs. Bomford and M'Afee before a Committee of the House of Commons and elsewhere." A statement made by either of these gentlemen before a Committee of the House of Commons, or anywhere else, if it showed that he was "in the habit of valuing land upon erroneous principles," would be *prima facie* evidence that his valuation in a particular case was erroneous.

Under the Act of 1881, sect. 8 (1), the determination what is a fair rent, upon which the Court valuers opinion and report were given by direction of the Land Commission, and might under sect. 48 (4) be adopted, is the resultant of regard to the interest of the landlord and tenant respectively, and of consideration of all the circumstances of the case, holding, and district. The interpretation of all this involves principles of law and fact, which have been the subject of discussion and of inquiry, and many of which have been dealt with by decisions of the Land Commission and of this Court. The result in the three cases before us, that rents judicially fixed for the first statutory term at £52 10*s.*, £29, and £11 10*s.* ought, in the opinion of the valuers, to be reduced for the second term to £34 8*s.* 2*d.*, £15 13*s.* 7*d.*, and £8 4*s.* 5*d.*, challenged inquiry as to the mode by which it was arrived at. There must have been error, either in the first determination, or in the valuers opinion, or in both, or there must have been a change of circumstances in the meantime reducing the fair rent by more than one-third. Which or how many of these causes contributed to the result is a legitimate subject of evidence, and ought to be capable of proof. At all events, evidence to show that the reduction is due to error of the valuers must be admissible.

Evidence of bias and prejudice is also, in point of law, admissible, and the Land Commission is bound to receive it, if it goes to prove that a valuer is, in the words of this case, "incapable of acting with independence in any particular case." For these reasons, on the words of the case, it appears to me that the rejection of evidence was, in point of law, too wide, and can not be supported.

I must add that there are statements in the case which appear to me to show affirmatively that the ruling rejecting the evidence was made upon a ground which is unsustainable in point of law. The fact that Messrs. Bomford and M'Afee held warrants as Assistant-Commissioners is referred to as justifying the Land Commission in "assuming and relying upon their skill, integrity, and independence," to the extent of holding that the Commission "*could not legally enter*, and ought not to enter, upon a public inquiry in the manner suggested," *i.e.*, allow any evidence to be given as to their conduct and capacity, while acting as Assistant Commissioners *or otherwise.* This can mean nothing less than that the official position of these gentlemen made evidence inadmissible to show that they were fallible. That the decision went to this length appears from the report in "Greer's Cases," vol. 2, at p. 56. Meredith, J., is there reported to have said that the Land Commission "would not for one second tolerate the production of a witness to tell the Court what Mr. M'Afee had stated to a Committee of the House of Commons as regards his general method of valuation, and his particular dealings in particular cases." Evidence tendered in these terms might include evidence applicable to the particular case before the Court, or to the method of valuation adopted by Mr. M'Afee in reporting upon it. He is further reported to have said that "*a fortiori* they would reject evidence which counsel said he was prepared to give to show bias and prejudice, which would render these gentlemen incapable of acting with independence in any particular case," and consequently in the case at hearing. At p. 73 (same volume) he says that "counsel also stated that he was prepared to refer in evidence to the decisions of these gentlemen as Assistant Commissioners." Such evidence might show that they acted erroneously or unjustly in similar cases, under circumstances, or in a way, which would support the inference that they had done so in their report in this case. The *dictum* that the Land Commission is "bound to assume, that if, by words or acts or conduct, they had unfitted themselves for the discharge of the responsible duties with which they are entrusted, they would not now hold office," cannot, in point of law, justify the exclusion of evidence offered to prove that in a particular case they had erred in law or in fact, or had been actuated by bias or prejudice. For these reasons I cannot indiscriminately affirm the rejection of evidence upon which the second question calls for the decision of this Court "in point of law."

I may refer to two classes of authorities which, though in many important respects different from the present, yet present some instructive analogies. The report of a Court valuer is neither the evidence of an expert witness, nor the award of an arbitrator. But it resembles evidence, as being the material upon which the judicial decision of mixed questions of law and fact may be based, and it is the pronouncement of an expert upon a reference in which the honesty and qualifications of the referee are relied on. Though the Court valuer is not examined as a witness in the first instance, he may, if necessary, be called on to rebut any evidence that he has acted upon erroneous principles, or improperly. His report appears to me to stand very much upon the same basis as evidence in chief given by an expert, and if so, the law relating to the admissibility of evidence to contradict a witness by his own statement, has a distinct bearing upon the question now submitted to us. I take the rules as to witnesses in general, and as to experts, from Taylor, vol. II., paragraph 1445—

> "A witness may be cross-examined as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, and if he either denies or does not distinctly admit, that he has made such statement, proof may be given that he in fact made it."

Analogy leads me to the conclusion that a former statement made by a Court valuer of the principles of valuation upon which he acts may be proved, to show that his principle of valuation is erroneous, and the proof may be given if the circumstances, or the terms of the statement, raise the inference that the valuer acted upon an erroneous principle in the case on which the report is made. The special rule as to experts is thus stated:—

> "If a witness be a skilled witness, called to state his opinion on a matter of science, he may on cross-examination be asked whether he has not on some particular occasion expressed a different opinion upon the same subject, and if he deny the fact, it may be proved by other evidence."

Holding, as I do, that a Court valuer's report is a statement of opinion in the nature of evidence, I should hold evidence to be admissible to show that he has, on some particular occasion, declared that his opinion rests upon a principle which is erroneous, and which affects the result in the particular case.

The other class of authorities which present some analogy are those relating to arbitrators. Parties are, as a general rule, precluded from impeaching the awards of arbitrators as erroneous, either in law or fact, but this is on the ground that they are judges of the parties own choosing, which cannot apply to valuers appointed by the Land Commission without the concurrence, and in these cases against the will, of the parties. Even in the case of arbitrators, where a mistake affecting the result of the award is clearly proved, Courts both of Law and Equity set it aside. The inclination of the modern decisions to hold that an award, good on its face, is not to be impeached on the ground of mistake alone, is due to the arbitrators being judges of the parties own choosing. Russell says (section 7), it is clear that, for an admitted mistake of the arbitrator, a Court of Equity will refer back an award. By analogy, it appears to me to follow, in the case of Court valuers reports, that not only bias and prejudice, which will in all cases invalidate awards, if amounting to misconduct, but also mistake, either in the principles of valuation, or in fact, if affecting the result, may be proved, and consequently, that evidence of bias or mistake is admissible, and when tendered and found to be legal and relevant, must be received by the Land Commission and considered, before the report should be adopted or not.

WALKER, L.J. :—

We decided in *The Gosford Case* (1), that valuers to whom a reference had been made by the Land Commission were independent valuers within the meaning of section 48, though they were Assistant Commissioners, and had been appointed to that office by the Lord Lieutenant; 2, that a reference for their opinion was properly made at the time, and in the manner and form, and containing the particulars followed in the present case; 3, that it was lawful to furnish such valuers with the materials supplied to them in the present case; 4, that though the Commissioners might, or might not, act upon the opinion which the valuers gave them, still the order which the Commission might make was their own, and only their own, judicial act; 5, that a reference to two valuers was legal, and we expressed approval of the practice of furnishing the report of the Court valuers to the parties before the hearing.

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(1) [1899] 2 I. R. 399.

I stated in my judgment in that case that the only ground on which I thought the litigation in *The Gosford Case* (1), might prove useful, was that it might lead to a final settlement of the practice and putting it on a firm basis, and though my anticipation has proved vain, it does not follow that rediscussion is called for of what was there decided.

Our opinions were not rested upon the consideration that the application was for a *certiorari.* No such idea entered into my mind, and the language of Lord Justice Holmes shows that he decided that case upon the construction of the statute, and Lord Justice Fitz Gibbon took special care to point out that he decided the case, not upon the *certiorari* but because what had been done was right.

The other questions submitted to us are the concrete ones, Whether we were bound in law to receive the evidence tendered as regards Messrs. Bomford and M'Afee in the case of *O'Regan* v. *Trench.* I find myself unable to give the same answer to this second question as my colleagues, but the difference between us is not on any question of law, but upon the form of the case. I do not take Mr. Justice Meredith as submitting to us any abstract or general question as to whether all evidence was necessarily excluded, but whether the particular evidence tendered should be received,

All the objections and questions submitted in reference to them are pointed to a requisition that the Court should not receive or act upon the report of the Court valuers upon certain stated grounds. The first two I need not refer to as they are

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(1) [1899] 2 I. R. 399.

Appeal.
1900.

O'REGAN, *Tenant;* TRENCH, *Landlord.*

Walker, L.J.

disposed of by *The Gosford Case* (1) and I shall pass to the third. This one suggests that the Court valuers' report should not be received or acted upon, "because" neither is an independent valuer within the meaning of the section "inasmuch as," and now come three separate grounds for establishing that they are not within the section: (*a*) that they both have been employed for many years as Assistant Commissioners; this is disposed of by our former decision; (*b*) because as *such Assistant Commissioners they have been in the habit* of valuing land upon entirely erroneous principles; (*c*) because they have each of them shown bias and prejudice against landlords generally so as to render them incapable of acting with independence in any particular case.

Thus (*b*) attributes to them a disqualification for the position of independent valuers on account of an alleged habit of valuing upon erroneous principles while they had many years before been Assistant Commissioners, and (*c*) attributes to them an incapacity to act fairly in an individual case by reason of bias and prejudice shown in other instances against the class of landlords.

It is not stated that this habit has followed them into the framing of the present report, or that bias or prejudice in fact underlies and corrupts it. We must remember that we have held them to be independent valuers for the purpose of the 48th section, though Assistant Commissioners, and that on the matters referred to them they express, as they are bound to express, opinions. The Court may agree or disagree with those opinions in whole or in part, and the order made by the Court is, to use the words of the Lord Chancellor in *The Gosford Case* (1), their "own independent judicial act."

What is the evidence tendered in support of? It is in support of the third objection that neither Mr. Bomford nor Mr. M'Afee who have made the report is an independent valuer within the meaning of the section, and the evidence is "statements made by Messrs. Bomford and M'Afee before a Committee of the House of Commons and elsewhere."

The statements are explained as tending to show—1, a habit of valuing land upon erroneous principles, and, 2, a bias and prejudice against landlords generally so as to preclude any independent action, and show they were not independent valuers. Counsel did not contend that this latter contention could be supported upon the tendered statements, and the idea would seem to me to have existed in some distorted imagination. The evidence tendered was not put into any specific form. I infer that was not done, because if the attempt had been made, the irrelevance of the alleged evidence would have become too apparent. I do not read the rejection by Mr. Justice Meredith of what was tendered as involving the rejection of all evidence that could be offered under any possible circumstances, nor do I think that he rejected it because the valuers happened to have been Assistant Commissioners, or clothed when acting as such with any quasi-judicial character. The inference I draw from the case is that he deemed the evidence referred to irrelevant, and so far as imputing bias and prejudice against the landlord class, absurdly scandalous. Considering the enormous inconvenience which would follow from importing into *O'Regan* v. *Trench* all the evidence given before the Morley Commission by Messrs. Bomford and M'Afee, I think the counsel who tendered the evidence were bound to set forth their questions in categorical form. They do not even propose to summon the Court valuers, or ask them questions, but only to read out statements made by them as in themselves establishing their legal incapacity to be considered independent valuers, and it is to this incapacity the reading of the statements is intended to be addressed. It is addressed to a disqualification for office, and not to possible error. It was not suggested even that the Court valuers should be summoned for examination or themselves asked about the statements. It cannot be suggested that Court valuers are in the position of arbitrators. Arbitrators are domestic judges, and if they were such our decision in *The Gosford Case* (1), would be clearly untenable. Fraud or misconduct in valuers might I have no doubt be proved. Evidence of error in an arbitrator has been frequently rejected in the case of an arbitration while the award stands. There is no analogy between their positions.

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(1) [1899] 2 I. R. 399.

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(1) [1899] 2 I. R 399.

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Indeed, it seems to me the reception of evidence is easier in the case of the valuer. I can imagine many instances in which a Court valuer might, if he were summoned, be questioned as to possible corrupt acts or possible erroneous ideas, but we are not dealing with any abstract question, we have to answer a very special one.

Meredith, J., in his written judgment goes first into the reasons which influenced him to reject the tendered evidence. [His Lordship read part of Mr. Justice Meredith's judgment (Greer's Land Cases vol. ii. p. 56.)] He then goes into the position of Court valuers, and shows, as I understand him, that their capacity for office and status should not be impeached by the kind of evidence tendered. That is what I understood him to be dealing with.

I have already said that the difference between me and my colleagues arises upon the form of the case. I am not expressing dissent as to the admissibility of evidence in many cases, and in many conceivable instances, that might be just. But I abstain from saying "yes" to the second question submitted, lest I should be taken to endorse the admissibility of the evidence tendered and alone referred to in the question as establishing non-independence.

If I were at liberty to give an answer in the abstract to an abstract question I would willingly say "yes," but we have decided that we are not at liberty to answer abstract questions, and, therefore, I prefer to say "no" with the explanations I offer, to saying "yes" with explanations which can form, on this record, no part of the answer.

I, of course, concur with the other members of the Court, that the first question should be answered in the negative.

Holmes, L.J. :—

The first question reserved for the decision of the Court of Appeal by the case stated relates to the appointment by the Land Commission of independent valuers under the provisions of the Land Law (Ireland) Act 1881, section 48 sub-section 4.

For some years it has been the practice of the Land Commission before the rehearing of an application to fix a fair rent which has been already heard by a County Court Judge or by a Sub-

Commission to call for a report from two persons skilled in valuing land. The mode in which this is done is by supplying the two valuers with the originating notice, certificates of the poor law valuation, the order made on the original hearing, the schedule attached thereto, the map referred to therein, and the notice of appeal. These documents are accompanied with, or preceded by, an order directing the valuers to report their opinions on the several matters set out in a form issued for that purpose, which corresponds substantially with the form used in recording the several particulars required by the 1st section of the Land Law (Ireland) Act, 1896. This practice was followed in the three cases now before the Court; and in each of these cases the valuers selected were Assistant Commissioners appointed by warrant of the Lord Lieutenant pursuant to statutory powers.

The first question reserved is whether the Land Commission was bound in point of law to refuse to receive or to act upon the reports of these valuers by reason of certain alleged illegalities in their appointment, and in the manner and character of the reference to them. As far as I am concerned, I have already considered and given an opinion upon most, if not all, of these alleged illegalities in *The Queen* (*Gosford*) v. *The Irish Land Commission* (1). I dealt in that case with the reference being previous to the hearing, with the fact that it was to two valuers, with the documents that accompanied it, and with the nature of the report required; and I came to the conclusion that in none of these several matters was the power conferred by the 48th section exceeded or departed from. The opinion I then expressed on this point were not *obiter dicta*, but my "*ratio decidendi*"; for I held in that case, differing I think in this respect from the judgment of the Divisional Court, that if the reference to the valuers was illegal, either as a whole or in a substantial part, the writ of *certiorari* ought to issue. I see no reason for altering the conclusions I then arrived at after anxious consideration; and it would serve no useful purpose for me to go over the same ground again. The only additional objection that has been made in the present case is that the valuers to whom the reference was made were themselves Assistant Commissioners. But this does not constitute a

(1) [1899] 2 I. R. 399.

disqualification; they are independent, in the only sense I can give that word in the connection in which it occurs—independent of the parties, independent of the other witnesses, and unconnected with the previous decision. The real objection—implied rather than expressed—is that, being themselves members of the same body and liable to discharge the same functions as the gentlemen who had first heard the case, they would be slow to differ from their conclusions. This may be so with sub-commissioners, but it is not the inference one would draw from a general study of human nature. Two of a trade do not always agree. I have never noticed that the evidence of expert witnesses is much influenced by considerations of *esprit de corps.* The old Court of Exchequer Chamber was not a satisfactory tribunal; but the fact that its members were reviewing to-day the judgments of brother Judges by whom their own judgments might be reviewed to-morrow did not tend to make them less disposed to criticise or reverse. These, however, are matters with which this Court has nothing to do. It is not for me to say whether the mode of reference now practised by the Land Commission is the best. It would be impertinent in me to offer an opinion on the subject, and indeed I have not the means to form one. I confine myself to holding that the limits of the power conferred by the statute have not been transgressed.

The second question relates to certain evidence tendered in the first of these cases—*O'Regan* v. *Trench.* In support of an objection that each of the two valuers had shown bias and prejudice against landlords, evidence was tendered of statements made by the valuers before a Committee of the House of Commons, and elsewhere, with a view to showing that they were in the habit of valuing land upon erroneous principles, and that they had shown bias and prejudice against landlords generally, so as to render them incapable of acting with independence in any particular case. It was open to the Land Commission to invite the counsel who tendered the evidence to state its nature more specifically. It is possible that if this had been done, it would have appeared that the proposed evidence was either illegal or worthless. But this course was not taken; and I gather from the judgment of Mr. Justice Meredith, that it was deliberately avoided for the purpose of raising the question—no doubt a very important question—whether, under any circumstances, evidence of the kind suggested, even although it might be of the most cogent and convincing character, was legally admissible?

Mr. Justice Meredith held that it was not, upon grounds of a very far-reaching character. His judgment seems to have been based upon the fact that the valuers were Assistant Commissioners appointed by the Lord Lieutenant in pursuance of statutory powers, and that the only remedy open to a litigant charging them with incompetency or misconduct, was to appeal to the Lord Lieutenant with the view of having them removed from their office. Upon this principle, it would not be permissible for a landlord or tenant to show, at the re-hearing of his case, that the valuer who had reported pursuant to the 48th section, had received a bribe from his opponent for reporting in his favour, or that he had adopted, either generally or in the prescribed case, the most erroneous principles or the most mistaken practices of valuation. I am of opinion that such a proposition cannot be sustained, and that the ruling of Mr. Justice Meredith rests on a complete misconception of the position of a valuer under the 48th section. He is not performing any judicial function; he is merely a person giving expert evidence in the form of a report which, by the terms of the statute, the Land Commission may adopt, although it is not given under the sanction of an oath, and is not subjected to the test of cross-examination. The fact that he is also an Assistant Commissioner, and as such may be called on to perform judicial duties, is merely accidental. It will not be denied that it is contrary to the policy of the law, to allow evidence to be given in a Court of Justice for the purpose of showing that a Judge appointed by the Crown has exhibited incompetence, or been guilty of misconduct, while acting within the jurisdiction conferred on him by virtue of his office. Except in those cases where there is a remedy by writ of *certiorari*, the only way in which charges of this kind can be dealt with, is by an appeal to the authority that has power to remove him from his position. But a valuer appointed under the 48th section cannot claim the protection of this principle.

He may be—it was probably originally contemplated by the

Legislature that he would always be—a professional man, casually selected by the Court *pro hac vice*, and paid by one or other of the parties. Could it be said in such a case that either of the litigants would not be entitled to show that his report ought not to be acted on or adopted, by reason of bias, misconduct, negligence, or ignorance? Would evidence directed to such an object be irrelevant or immaterial? I am clearly of opinion that both the rules of law and the elementary principles of justice, require that evidence of this kind if otherwise legal, shall be received. I quite recognise the inconvenience of an inquiry such as I have mentioned being carried on behind the back of the person impeached; and a tribunal ought to be careful not to allow it to be entered on without an adjournment of the hearing, so as to enable him to receive due notice. Moreover, if the charge should fail, all the costs consequent thereon ought to be borne by the party making it. These however are matters of detail, and do not touch the principle we are called on to decide.

The question asked is, whether the Land Commission was bound in law to receive the evidence tendered. I have already pointed out that we have no information of the specific character of the evidence proposed to be given; and we must, I think, read the question as extending to any legal evidence that would come within the description contained in the case. For instance, it would include evidence that one of the valuers had held, and acted on the view that for fifty years before the Land Act of 1881, rents were double what they ought to have been, having regard to the true value of the land, and that as compensation therefor, fair rents for fifty years after the Act ought to be fixed at one-half its value Of course I offer this as an entirely imaginary example; but, unfortunately, the question covers, and I believe was intended to cover, every piece of evidence coming within the description which it is possible to conceive or suggest.

I feel, therefore, bound to answer in the affirmative; nor can I relieve myself therefrom by holding that the admission or rejection of the evidence is within the discretion of the Land Commission. It is the right of a litigant that all legal evidence relevant to any issue which the law permits him to raise should be received, and the Court is given no discretion in the matter.

I may add a word for the encouragement of those who think that the reception of this kind of evidence will lead to scandal and embarrassment. To my mind, it will do nothing of the kind. These valuers are doubtless competent and honest gentlemen; and if the evidence is entered on, its worthless character will probably be at once apparent. Misconception and scandal are much more likely to arise from a Court of Justice treating the report of a Government official, as in a measure *sacro sanct*, than by subjecting it to the tests by which the value of all other testimony is weighed and measured.

Having thus stated my reasons for answering in the affirmative the second question, according to what I believe is its true construction, I should prefer to go no farther. I think it inconvenient, and possibly misleading, to attempt to lay down rules, or even to make suggestions as to the limits within which evidence of the kind referred to is admissible. It would be impossible, on an occasion like the present, to treat this topic exhaustively; and it would, therefore, I think, be more prudent to discuss it when concrete cases arise. As, however, it has been referred to in some degree by my colleagues, I ought perhaps to add a few words.

I am of opinion that evidence to be admissible, must bear upon the conduct and valuation of the valuer in the particular case at hearing, either directly or inferentially; but that it does not follow from this that it is to be confined to something said or done by him in the course of the particular valuation. It would, I think, be legitimate to show by any kind of legal proof that the valuer was in the habit of acting on erroneous principles of valuation in cases similar to the case under consideration. I am further of opinion that statements made by the valuer himself, if definite, unambiguous, and relevant, would be legal proof; and the fact that such statements had been made to a Committee of the House of Commons would not, in itself, render them inadmissible (1).

Solicitors for Lord Gosford: *Monroe & Anderson.*

Solicitors for the tenants: *Duff & Lavery.* R. D. M.

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(1) The evidence, when given, was held quite insufficient to support any of the allegations.

Ross, J.
1901.
Feb. 20.

IN THE MATTER OF THE ESTATE OF EDWARD BROWN, DECEASED; PATRICK COYLE *v.* DONNELL M'FADDEN.

Statute of Limitations—Next-of-kin remaining in possession of chattel real—*Acquisition of beneficial interest—Joint tenancy.*

Where some of the next-of-kin of a tenant who died intestate continued in possession of his holding for a period sufficient to confer title under the Statute of Limitations:—

Held, that they had thereby acquired a beneficial title under the Statute; and that the character of the title was a joint tenancy.

COUNTY COURT APPEAL, from a decision of the County Court Judge of Donegal.

The facts were as follows:—Charles Brown, who held a farm of land as tenant from year to year, died intestate about the year 1858, leaving five children, Hugh, Edward, and Nancy Brown, and two daughters who were married in his lifetime, namely, Norah Coyle and Mary Shiels. Upon his death Hugh, Edward and Nancy continued in exclusive occupation of the farm. Hugh died in 1877, intestate, leaving Edward and Nancy in possession; and letters of administration of Hugh's personal estate were granted to Edward in 1879. Edward, whose name had been inserted in the books of the landlord as tenant, died in June, 1891, leaving Nancy in possession, and letters of administration to his personal estate were granted to Patrick Coyle (the plaintiff), in July, 1897. Nancy Brown assigned the farm to Donnell M'Fadden (the defendant), in April, 1896, and died in January, 1897. In November, 1897, an equity civil bill for the administration of Edward Brown's estate was brought by Patrick Coyle against Donnell M'Fadden. Patrick Coyle abandoned the suit in June, 1899, and the carriage was transferred to James Coyle. The County Court Judge having made an order for the usual accounts and inquiries, the matter came before him on the 21st of June, 1900, on further consideration of the certificate of the Clerk of the Peace, and the following order was made :—" It is further ordered and decreed that the only estate of the defendant takes under the said indenture of assignment is the share of the assets of the said intestate, Edward Brown, that Nancy Brown, the grantor in said indenture, was entitled to, as the lawful sister and one of the next-of-kin of the said intestate, and doth declare it to be valid in respect of said share only." From this decree the defendant appealed.

Serjeant Campion, K.C. and *Calvert*, for the defendant and appellant :—

We say, firstly, that the next-of-kin obtained a statutory title : Shelford R. P. (9th edition), 117 ; and, secondly, that the character of their possession was a joint tenancy, which passed to the last survivor, Nancy. · This joint tenancy was never severed. As to the first, the three children were in possession, not as next-of-kin, but adverse to the claims of the personal representative (when raised) of their father : *Mac Cormack* v. *Courtnay* (1), *In re M'Clure and Garrett's Contract* (2), *Dwyer* v. *Whitelegge* (3), *Paull* v. *Simpson* (4). As to the second, we say the character of the possession was a joint tenancy : Darby and Bosanquet (2nd edition), p. 495 ; *Bolling* v. *Hobday* (5), *Ward* v. *Ward* (6). The change of the tenant's name in the landlord's rent receipts would not, in the absence of consent of the parties, operate as change of tenancy, or transfer the legal rights : *Bourke* v. *Bourke* (7).

Poole, for James Coyle :—

The occupation is to be attributed to that of next-of-kin, who have an interest in the estate : *Cooper* v. *Cooper* (8). Admitting that Edward and Nancy became joint tenants of the whole of the farm, the presumption is that Nancy made over all her interest in the farm to Edward in his lifetime, as the receipts were given in his name alone.

(1) [1895] 2 I. R. 97.
(2) [1899] 1 I. R. 225.
(3) 33 I. L. T. R. 179.
(4) 9 Q. B. 365.
(5) 31 W. R. 9.
(6) L. R. 6 Ch. App. 789.
(7) I. R. 8 C. L. 221.
(8) L. R. 7 H. L. 53.

Ross, J.
1901.

COYLE
v.
M'FADDEN.

Ross, J.:—

I do not think it necessary to reserve judgment. I should have great hesitation in interfering with the judgment of so eminent a lawyer as Judge Webb, if I were not clear as to the facts and the law. If he had had the case presented to him as it has been presented to me, he would, I am sure, have decided as I am about to decide. The following are the facts:—Charles Brown, the tenant, died in 1858. He had five children, of whom two were married daughters, and were not in possession. The other three remained, Hugh, Edward, and Nancy. Hugh was treated by the landlord as tenant: he got receipts in his own name, and the others knew of it. That of itself does not vest the property in Hugh, absolutely; it did not amount to a surrender of their interests by Edward and Nancy. Hugh died in 1877, and Edward and Nancy continued in possession. Then Edward died, and Nancy was left. At the end of the statutory period the title of the original tenant was gone. In whom was the tenancy then vested? Plainly in the next-of-kin in possession. In what capacity did they occupy? I cannot hold that they occupied in a fiduciary capacity at all. Though they were entitled to their shares, their possession of the whole was wrongful. They could have been ejected by the personal representative, on administration being taken out; they occupied no better position as to the estate than an ordinary trespasser. Therefore, I hold they acquired title by the Statute of Limitations. It is clear law that when parties together acquire title in this way, being disseisors, their interest is a joint tenancy, and not a tenancy in common. On Hugh's death, Edward and Nancy were joint tenants; and on Edward's death the whole tenancy vested in Nancy. I therefore reverse the decision of Judge Webb, and hold that the lands formed no part of the assets of the deceased. As the grounds of the learned County Court Judge's decree on the other subject of appeal have been displaced by my judgment, I shall send the case back to him, for his reconsideration on that point.

Solicitor for the appellant: *Mallins.*
Solicitor for the respondent: *R. E. Osborne.*

W. C. S.

KENNEY *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

M. R.
1900.
July 12, 13.

Appeal.
1900.
Nov. 20, 21.
1901.
Feb. 19.

(1900. No. 334.)

Insurance—Guarantee—Fidelity bond—Right to sue by person not a party to the contract—Receiver appointed by mortgagees under sections 19 *and* 24 *of the Conveyancing Act*, 1881.

The National Bank, who were mortgagees of A's estate, appointed B receiver under their statutory power conferred by the Conveyancing Act, 1881, and B and the defendant Corporation entered into a bond with the bank conditioned for B's due discharge of his duty as statutory receiver. A was not a party to this bond. B having made default, the bank were paid off the full amount of their demand out of the mortgaged estate:—

Held, by the Court of Appeal (*diss.* Walker, L.J.), reversing the decision of the Master of the Rolls, that A and the bank were entitled to sue on the bond for the amount of the default.

By indenture dated the 16th November, 1888, Charles Plunkett Kenney mortgaged the Rocksavage estate in the county of Monaghan to the National Bank to secure £4738 14s. 5*d.*, or such further sums as might thereafter become due by the mortgagor to the bank, with interest.

By deed poll, dated the 29th October, 1891, the bank under the statutory power in the Conveyancing Act, 1881, appointed Plunkett Kenney (son of the mortgagor), to be receiver over the mortgaged premises, and to apply all money received by him as such receiver in the manner directed by sub-section 8 of section 24 of the said Act.

On the the 29th October, 1891, Plunkett Kenney (the receiver), and the Employers' Liability Assurance Company entered into a bond with the National Bank for the sum of £1478, that Plunkett Kenney should, on or before the 30th April, 1892, and thereafter yearly, duly account to the said bank for all such rents and profits as he should receive, or might without his wilful default receive, out of the said Rocksavage estate, and should pay and apply as directed by the Conveyancing Act, 1881, all such sums of money, and should diligently and faithfully perform his duties as such receiver. The bond was in the following form :—

Know all men by these presents, that I Plunkett Kenney, and we, the Employers' Liability Assurance Corporation, Limited, are jointly and severally held, and firmly bound unto the National Bank, Limited, their successors and assigns, in the sum of £1478 of lawful money of Great Britain and Ireland, to be paid unto the said bank, their successors and assigns, for which payment to be well and truly made, I the said Plunkett Kenney, for myself, my heirs, executors, and administrators, and every of them, and we the said Corporation for ourselves, do bind and oblige ourselves for the whole, firmly by these presents.

Sealed, &c.,
Dated the 29th October, 1891.

Whereas by deed poll, dated the 29th October, 1891, the said National Bank, Limited, in pursuance of the powers given to them by the Conveyancing and Law of Property Act, section 24, and of all other powers, if any, the said bank thereunto enabling, did appoint the said Plunkett Kenney to be receiver over the lands and premises known as the Rocksavage estate, situate in the county of Monaghan, and in the said deed particularly described, And whereas the said National Bank, Limited, have approved of the said Employers' Liability Assurance Corporation to be sureties for the said Plunkett Kenney, as such receiver in the said sum of £1478. Now the condition of the foregoing bond and obligation is such, that if the above-named Plunkett Kenney do and shall, on or before the 30th day of April, 1892, and thereafter yearly, duly account to the said bank, such account to be verified by declaration, of all such rents and profits as he shall have received, or without his wilful default, might have received, out of the said lands and premises, over which he has been so appointed receiver, and shall pay and apply, as directed by the said Act, all such sum or sums of money as shall at any time or times be in his hands, or properly chargeable against him as such receiver, and shall in all things diligently and faithfully perform and discharge all and every his duties as such receiver without any wilful default, then the foregoing bond or obligation shall be null and void, otherwise to remain in full force, provided always that if default shall be made by the said Plunkett Kenney to pay into the office of the said Corporation, on or before the 12th day of September in the year of guarantee, the annual premium or sum of £14 15*s*. 6*d*., the said Corporation shall at any time after such default, be at liberty to notify in writing to the National Bank, Limited, that at the expiration of one calendar month from the date of such notice, their further liability as such sureties as aforesaid will cease; provided always, and it is hereby declared that the bond is entered into by the said Corporation, on the condition that the capital, stock, and funds according to the memorandum and articles of association of the Corporation, shall alone be liable to answer and make good all claims in respect of this bond, and that no director or proprietor of the Corporation shall, in any manner, be personally liable or subject to any claims or demands by reason of such bond beyond the amount unpaid of his or her share of such capital, stock, or funds.

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The said receiver did not account to the bank for all the rents of the mortgaged property received by him, or which, but for his wilful default, he might have received, out of the said mortgaged premises, and did not apply the rents in conformity with the provisions of the Conveyancing Act. The National Bank brought an action against him in the Vice-Chancellor's Court, and by an order in that action, dated the 15th June, 1898, it was ordered that the said Plunkett Kenney should pay to the said bank the sum of £667 17*s.* 3*d.*, being the amount certified by the Chief Clerk to be in his hands, as such receiver. The said Plunkett Kenney did not pay the amount ordered to be paid to the bank by the Vice-Chancellor's order. The bank subsequently realized their security by a sale of part of the mortgaged premises in the Court of the Land Judge, and was paid in full the amount due by the plaintiff upon foot of the mortgage.

Charles Plunkett Kenney and the National Bank then brought an action against the Employers' Liability Assurance Company, claiming that the plaintiff, Charles P. Kenney as mortgagor of the Rocksavage estate, was entitled to the benefit of the bond, and that the defendants should pay to him the said sum of £667 17*s.* 3*d.*, or such sum as might be due on foot of the bond. By their defence, the defendants pleaded that the bond was given to the National Bank for their own protection as mortgagees; that the bond was not obtained in pursuance of any obligation or duty on the part of the bank towards the plaintiff, who was not a party to the bond. They further pleaded that Plunkett Kenney failed to pay the premium due on the 12th September, 1896, whereupon the defendants in pursuance of the provision in the bond, by notice, dated the 14th September, 1896, terminated their liability as sureties. They further pleaded that the bank had been paid off out of the proceeds of sale of the mortgaged property, and that no sum was payable by the defendants to any person under the bond. And lastly, that by section 24, sub-section 2, of the Conveyancing Act, Plunkett Kenney was, as receiver, the agent of the plaintiff, Charles Plunkett Kenney, and that the plaintiff was solely responsible for his acts and defaults.

O'Brien, Q.C., and *Herbert Wilson*, for the plaintiffs.

Matheson Q.C., and *Garrett Walker*, for the defendants.

July 13.

THE MASTER OF THE ROLLS:—

It is admitted that this is a novel case, and that there is no authority directly bearing upon it. It is a perfectly new cause of action as to matters in connection with the duties of receivers. The facts of the case are simple enough. Charles Plunkett Kenney on the 16th November, 1888, mortgaged the Rocksavage estate in the county of Monaghan to the National Bank to secure repayment of £4738 14*s.* or such further sums as might thereafter become due by him to the bank with interest. On the 29th October, 1891, the bank by deed poll under the statutory power contained in the Conveyancing Act, 1881, sections 19 and 24, appointed one Plunkett Kenney to be receiver over the mortgaged premises, and to apply all money received by him as such receiver in the manner directed by section 24, sub-section 8 of the said Act. The deed poll schedules the lands over which the receiver was appointed, but there is nothing further of importance in it. By sect. 19 (1) of the Act, a mortgagee, where the mortgage is made by deed, has the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further (iii), "a power when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof." The mode of carrying this out is provided for by section 24; sub-section 1 provides that a mortgagee entitled to appoint a receiver under the power in that behalf conferred by the Act (*i.e.* a mortgagee by deed) shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by the Act, but may then by writing under his hand appoint such person as he thinks fit to be receiver. Sub-section 2 provides that the receiver shall be deemed to be the agent of the mortgagor, and the mortgagor shall be wholly responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides. The receiver appointed by the bank under this provision was, it appears, the son of the mortgagor, but it is not suggested that he was nominated by the mortgagor, and the case must be treated as if he had been a total stranger to him. Having been appointed, his duties are prescribed by the subsequent sub-sections, and the mode in which he is to apply all moneys received is stated in sub-section 8, as follows:—1, In discharge of rents and outgoings; 2, in keeping down annual sums or other payments, and interest on all principal sums having priority to the mortgage in right of which he is receiver; 3, in payment of his commission, &c.; 4, in payment of interest due under the mortgage; after which he is to pay the residue of the moneys received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property, *i.e.* either to the owner or to the *puisne* incumbrancers.

The duties defined by this enactment are not novelties. Similar provisions are contained in section 23 of Lord Cranworth's Act (23 & 24 Vict. c. 145), and they are in fact a statement of the duties of all receivers. The question is as to the obligations imposed by these last words of sub-section 8. They contain no reference to any guarantee or indemnity for discharging the duties of receiver. The mortgagee need not obtain an indemnity for the acts of the receiver, although it might be thought not unreasonable that security should be taken for the benefit of the mortgagor as well as the mortgagee when the receiver is appointed *in invitum*. If the bank chose to take security from any one else for the acts of the receiver that was their own affair, and there is nothing before me to show that the mortgagor knew anything of the bond which the bank took. The bond recites—[His Lordship read the bond, *ante*, p. 302].

There is nothing to show that this bond was entered into in pursuance of any contract with the owner of the property, or that he ever heard of it. The receiver got into arrear, and proceedings were taken in the Vice-Chancellor's Court by the bank against him, and an order was made in that action on the 15th June, 1898, that the receiver should pay to the bank the sum of £667 17*s.* 3*d.*, being the amount certified by the Chief Clerk to be in the hands of the said Plunkett Kenney as such receiver.

After the date of that order the bank had several courses open to them. They could have proceeded against the receiver if he had been worth suing, or they might have sued the Corporation on the bond, or they might have taken proceedings against Mr. Charles Kenney, the principal debtor, or exercised any or all of these rights at the same time. I am not aware of any rule of law to compel them to sue upon the bond, if they did not choose to do so. As a matter of fact they did not sue on the bond, but they got payment of the whole of the balance due to them out of the Rocksavage estate, which was the primary fund, so they would have no claim for any money compensation, even if it turned out that the money applicable to demands *puisne* to them or otherwise, were not paid. They were out of it altogether when paid.

The bank, however, have been joined as co-plaintiffs in this action with Mr. Charles Kenney the mortgagor. He says that though he was not a party to the bond, its terms are wide enough to secure compensation to him for any neglect of the receiver in discharging his statutory duties. If the bank had sued the Corporation on the bond and recovered the amount due by the receiver from them, his estate would not have had to pay that sum, namely £667 14*s.* 3*d.* Therefore his case is that he is entitled to stand in the shoes of the bank to the extent to which they have received money from his estate which they could have got from the Corporation. This is a sort of inversion of the relations of principal debtor and surety, and is not founded on any principle that can be recognised in this Court.

Mr. O'Brien argued that the mortgagor was equitable assignee of the right to sue on the bond; but the answer to this is, that there was no right to sue capable of being assigned, the whole amount due by the receiver having been received. The question is, was the mortgagor a *cestui que trust*, and did the bank stand in a fiduciary relation to him according to the rule as explained in *Gandy* v. *Gandy* (1), so as to entitle him to sue by himself. It was no doubt because of that case that the bank were brought in as plaintiffs. But if it is put on the ground that the bank has no longer any right to sue, is Mr. Charles Kenney entitled to maintain the action as a *cestui que trust* by virtue of some contractual relation, by which a trusteeship is established? The bank is under no obligation to Mr. Charles Kenney. He never paid the premiums payable to the Insurance Society. The bank was not responsible to him; he was an entire stranger to the bond; there is nothing to show that he knew of its existence. No bond need ever have been taken at all. The case bears some analogy to those in which fire insurances have been effected without any legal obligation to effect them, cases between landlord and tenant, mortgagor and mortgagee, and the like, and in these, apart from contract, there is no right to sue, save in the party insuring, and then only for his own benefit.

Although the condition of the bond is to discharge the duties imposed on receivers by the Conveyancing Act, that is only a compendious way of saying how he was to perform his duties. He had to account with the bank, and the Corporation was surety for him to the bank. The insurance was for the person with whom the Corporation contracted, and nobody else.

I regret the result at which I have been obliged to arrive, as the Corporation gets off scot-free, although they received the premiums for undertaking the liability as surety to make good the receiver's default. Mr. Charles Kenney is not deprived by this decision of any right he had, but his estate having paid what it was bound to pay, he can get no benefit from a security to which he was not a party.

W. L.

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(1) 30 Ch. D. 57.

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The plaintiff appealed to the Court of Appeal (1).

O'Brien, Q.C. and *Herbert Wilson*, for the appellants :—

An indemnity given to a mortgagee for the fidelity of a receiver enures for the benefit of all parties interested in the estate. The intention of the parties here was that any loss occasioned through the default of the receiver was to be secured. The statutory contract is that if a mortgagee appoints a receiver, he does so for the benefit of everyone interested in the rents and profits.

It is true that a person who is not a party to an agreement could not sue on the contract at law, but a Court of Equity will enforce the contract : *Empress Engineering Company* (2) ; *Gandy* v. *Gandy* (3) ; *Drimmie* v. *Davies* (4) ; *Gemmell* v. *Cuming* (unreported) (5). Where a policy of insurance is made for the benefit of all parties interested, a person other than the insurer can recover : *Hagedorn* v. *Oliverson* (6) ; *Braik* v. *Douglas* (7) ; *Williams* v. *North China Insurance Company* (8).

Matheson, Q.C. and *Garrett Walker*, for the respondents :—

This is not a fidelity bond ; it is a bond taken out by the mortgagees for their own protection. By sect. 24, sub-sect. 2, of the Conveyancing Act the receiver is the agent of the mortgagor.

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(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ. (2) 16 Ch. D. 125. (3) 30 Ch. D. 57. (4) [1899] 1 I. R. 176.

1898.
Oct. 31.

(5) GEMMELL *v.* CUMING.

This was an action by Andrew Gemmell, Alexander Gray, and William Murray as trustees of a marriage settlement, dated the 26th June, 1845, entered into on the marriage of George R. Cuming with the defendant, for payment by the defendant as executrix of her said husband, of a sum of £768 due for principal and interest up to January, 1897, on foot of a covenant contained in the said settlement by the said George R. Cuming to pay £500 (in the events which had happened) to the children of the intended marriage, together with a fifth part (£100) of said principal sum in case of non-punctual payment, and legal interest thereon, amounting to £168.

The marriage settlement, dated the 26th June, 1845, was in Scotch form, and was made between George R. Cuming, residing in the county of Westmeath, of the one part, and Mary Skirving, residing in Haddingtonshire, North

(6) 2 M. & S. 485. (7) 4 M. & C. 320, note. (8) 35 L. T. (N. S.) 884.

The bank had the first mortgage, and they have been paid, and the receiver had a surplus after paying the mortgagee. Once the receiver had paid the mortgagee, the account stops there.

C. P. Kenney, the plaintiff, was not a party to the bond. To entitle a third party, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right, which places him in the position of *cestui que trust* under the contract: *Gandy* v. *Gandy* (1), *Lloyds* v. *Harper* (2). Here there was no trust in favour of the plaintiff. If in the case of a limited owner an insurance is effected under which the limited owner recovers the full value of the property, he could not retain such value for his own use, because the contract of fire or marine insurance is one of indemnity: *Castellain* v. *Preston* (3). The insurance in this case is a contract of indemnity solely.

1901.
Feb. 19.

LORD ASHBOURNE, C.:—

This is an appeal from the Master of the Rolls, and the facts of the case are plain and not in controversy.

Charles Plunkett Kenney, on the 16th November, 1888, mortgaged the Rocksavage estate in the county of Monaghan, to the National Bank, to secure £4738 14*s.*, or such further sums

Britain, of the other part, by which (among other things) George R. Cuming covenanted for himself, his heirs, executors, and successors, to pay to the said Mary Skirving, in case she survived him, an annuity of £40 a year for her life, and he also covenanted to pay to the child or children of the marriage the sums following:—If not more three children the sum of £300, but if more than three children the further sum of £200 at the first term of Whitsunday or Martinmas after his death, together with the legal interest of the said sum from the said term of payment during the not payment of the same, with a fifth part more of said principal sum of penalty in case of not punctual payment. The said George R. Cuming also covenanted to insure his life for £500, and this policy was thereby assigned to trustees as security for payment *pro tanto* to the said Mary Skirving, in the first place, of the foregoing provisions in her favour, and in the second place for security and payment of the foresaid provisions in favour of the child or children of the marriage.

The sum of £300, and in the event aforesaid the further sum of £200, and the sums to be received in virtue of the aforesaid policy, in so far as the same

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(1) 30 Ch. D. 57. (2) 16 Ch. D. 290. (3) 11 Q. B. D. 380.

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as might thereafter become due by him to the bank, with interest.

On the 29th October, 1891, the bank under the statutory power contained in the Conveyancing Act, 1881, sects. 19 and 24, appointed Plunkett Kenney, the son of the mortgagor, to be receiver over the mortgaged premises, and to apply all money received by him as such receiver in the manner directed by section 24, sub-section 8 of the said Act.

By sect. 19, a mortgagee, where the mortgage is made by deed, has the following power to the like extent, as if it had been in terms conferred by the mortgage deed, but not further— (1) (iii), "A power when the mortgage money has become due to appoint a receiver of the income of the mortgaged property, or of any part thereof." Sect. 24, sub-sect. 1, provides that a mortgagee is entitled to appoint a receiver under the power conferred by the Act in the manner therein stated. Sub-sect 2 provides that the receiver shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

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might not be applied for payment of the aforesaid provisions to the said Mary Skirving, were to be divided, in default of appointment by the husband and wife or the survivor, among the children, and the survivors of them, equally, and the issue of such as might have predeceased their parents leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life. The settlement contained a declaration that during the subsistence of the trust the said trustees' quorum or survivor of them shall have the most ample powers of management of the estate, and sums thereby conveyed to them.

There were six children issue of the marriage, two of whom died young, and of the four survivors two died during the life-time of Mr. and Mrs. Cuming, one of these leaving a son, George Olden, surviving. George R. Cuming died on the 6th January, 1890, and at his death there survived of the children, who were objects of the power of appointment, Mrs. White (formerly Cuming), Miss Sarah Cuming, and George Olden, a grandchild. On the 18th January, 1895, Mrs. Cuming executed a deed of appointment, purporting to be under the power reserved in the settlement, by which she appointed the entire of the fund to Mrs. White and Miss Sarah Cuming, and nothing to George Olden.

Mrs. Cuming afterwards brought an action in the Courts in Scotland against Andrew Gemmell, Alexander Gray, and William Murray, the persons

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The receiver having been appointed, his duties are prescribed by the subsequent sub-sections, and the mode in which he is to apply all moneys received, is stated in sub-sect. 8 as follows:—

(1) In discharge of rents and outgoings; (2) In keeping down annual sums or other payments and interest on all principal sums, having priority to the mortgage in right of which he is receiver; (3) In payment of his commission, etc; (4) In payment of interest due under the mortgage; after which he is to pay the residue of the moneys received by him to the person, who but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property, *i.e.* either to the owner, or to the *puisne* incumbrancers.

The question is, what are the rights of the plaintiffs under the obligation imposed by the last words of sub-sect. 8? It is true that the words contained no reference to any guarantee or indemnity for discharging the duties of receiver; that there was nothing to compel the bank to take any bond; and that there is nothing to show that the mortgagor knew anything of the bond

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who had been appointed trustees of the settlement of 26th June, 1845, in lieu of the original trustees, claiming the interest of the trust fund. The trustees then brought a cross action to have the questions arising under the settlement and deed of appointment decided, and George Olden also brought an action claiming a share of the property. These three actions were consolidated in "Multiple Joinder," and the case, so consolidated, was heard before Lord Pearson, who decided that as under the terms of the settlement the appointment should have been made prior to the time of the payment of the money (viz., the Martinmas after George Cuming's death), and the fund not having been appointed before that time the appointment was bad, and that the trustees were entitled to the money so appointed. The terms of the order of the Scotch Court, dated the 2nd June, 1896, were—"The Lord Ordinary having considered the cause, repels the claim of Mrs. Mary Skirving, or Cuming, No. 9 of process; Ranks and prefers the claimant, George Ronaldson Cuming Olden, to one-third share of the sum of £500, with interest from Whitsunday, 1890, in terms of his claim, No. 8 of process, and *quoad ultra*; Ranks and prefers the claimant, Andrew Gemmell, as trustee foresaid, in terms of his claim, No. 7 of process, and decerns: Finds the respective claimants entitled to their expenses out of the trust funds."

This decision was affirmed on appeal to the Inner House on the 13th November, 1896. The present action was then brought by the trustees against

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which the bank took. But how far do these points affect the question, having regard to the form of the bond? The bond recites:—

[The Lord Chancellor read the bond, *ante*, p. 302].

The terms and structure of the bond are of the highest importance. The condition of the bond is for the diligent and faithful discharge of "all and every his duties as such receiver." There is nothing to limit or qualify in any respect these wide words, or to cut down the plain meaning of the words of sub-sect. 8, which directed the receiver after payment of the interest due under the mortgage, "to pay the residue of the moneys received by him to the person, who but for the possession of the receiver, would have been entitled to receive the income." Therefore the rights of the mortgagor were kept in clear view by this sub-section, and he was a person vitally interested in the faithful discharge of his duties by the receiver.

The receiver got into arrear, and proceedings were taken in the Vice-Chancellor's Court by the bank against him, and an order was made in that action on the 15th June, 1898, that the

Mrs. Cuming, as executrix of her husband, to recover the sum of £768, being the original sum of £500, provided for the children, £100 as penalty for non-punctual payment, and £168 for interest The action was tried by Boyd, J., without a jury, and on the 9th May, 1898, his Lordship entered judgment for the plaintiffs.

On the 10th June, 1898, the Queen's Bench Division (Palles, C.B., Andrews and Johnson, JJ.) set aside the judgment so entered, and entered judgment for the defendant. The plaintiffs appealed to the Court of Appeal (FitzGibbon, Walker and Holmes, L.JJ.), when the case was argued on the 28th October by *Matheson, Q.C.*, and *H. W. Jackson*, for the appellant, and *Matthew J. Bourke, Q.C.*, and *Gerald FitzGibbon*, for the respondent.

On the 31st October, 1898, the following judgments were delivered:—

FitzGibbon, L.J.:—

This action is brought by the plaintiffs as trustees of a marriage settlement of June 26, 1845, against the defendant as executrix of the intending husband, on foot of a covenant in said settlement contained. These are the words of the statement of claim. It is thus an action of covenant, and, being brought in an Irish Court, it must be shown to be maintainable here, either as an action at law, or as a suit in equity.

We have to dispose of the case according to the law of Ireland, and though receiver should pay to the bank the sum of £667 17*s.* 3*d.*, being the amount certified by the Chief Clerk to be in the hands of said Plunkett Kenney as such receiver.

The bank could then have proceeded against the receiver, or they might have sued the Corporation on the bond, or taken proceedings against the mortgagor. They did not sue on the bond, but they got payment of the whole of the balance due to them out of the Rocksavage estate, which was the primary fund, so that they would have no claim for any further money compensation, and they have sustained no loss. The person who has clearly and admittedly suffered by the default of the receiver is the mortgagor, who is a plaintiff in this suit.

The bank has necessarily been joined as co-plaintiffs in this action with Mr. Charles Kenney the mortgagor, who says that, though he was not a party to the bond, he is a person interested in the due performance of its condition, that it is wide enough to secure compensation to him for any neglect of the receiver in discharging his statutory duties, and that being clearly damnified, he is as clearly entitled to his remedy. It is obvious that if the

there may be differences of expression, and questions of construction to be considered in the case of documents drawn up in Scotland, no law but our own can be applied to the case before us. The first matter urged by the appellants was that recourse should be had by the Irish Court to the procedure created by 22 & 23 Vict. c. 63, for the purpose of ascertaining what the Scotch law is on the question before us. But the subject-matter of any proceeding under that statute must be some difference of law existing between the two countries, in respect of something in litigation here; and the proof of such a difference is the condition precedent to recourse to that procedure. It is a general rule, in regard as well to questions of law as also to questions of fact, that the question must be properly raised by the party on whom the *onus* lies. We have here no evidence, nor even any apparently well-grounded assertion, that a difference of law exists between Ireland and Scotland in regard to the subject of this appeal, and it not being shown that there is such a difference, we cannot put the Act into operation merely to inquire whether such a difference exists or not.

If it be said that it is a strong exercise of discretion to prevent the plaintiffs from trying to show that there is a difference of law, it appears to me that this is the last case in which we should, at this stage, give any exceptional facilities for raising any question not formally insisted upon at an earlier period. In the first instance, the whole matter in dispute was a small trust

Lord Ashbourne, C.

bank had sued the Corporation on the bond, and recovered the amount due by the receiver from them, the estate of the mortgagor would not have had to pay that sum, namely, £667 17*s.* 3*d.* He claims that he is entitled to stand in the position of the bank to the extent to which they have received money from his estate, which they could have got from the Corporation.

The Master of the Rolls decided against the plaintiff's claim, adding, however—"I regret the result at which I have been obliged to arrive, as the Corporation gets off scot-free, although they received the premiums for undertaking the liability as surety to make good the receiver's default."

The question for us to decide, is whether his decision is one which on appeal we should affirm. Is there any reason in law or equity why the Corporation should "get off scot-free, although they received the premiums for undertaking the liability as surety to make good the receiver's default?" No doubt, it may appear somewhat strange that the bank, who was named in the bond, has sustained no loss; that the mortgagor who was not named in the bond is the person who has suffered, and that the defendants are called upon to recoup the mortgagor

fund, amounting, with penalty and interest, to the inconsiderable sum for which Boyd, J., gave judgment. But this amount is now reduced by two-thirds, by the effect of the document which we have received in evidence, which, for some reason not yet fully explained, was rejected by the learned Judge, by which it appears that the beneficial claim of the adult children to their shares was not pressed in the litigation which took place in the Scotch Court. That litigation furnishes a further ground, if discretion should be our guide, for declining to afford any further facilities to the plaintiff Gemmell, and his co-plaintiffs, who are his nominees. The matter has already been "*in medio*" in Scotland, and now in Ireland the plaintiffs have commenced *de novo*.

There is a third, and, in my opinion, a complete answer to the question, put forward in the form in which Mr. Matheson and Mr. Jackson have presented it, viz.—Whether, according to Scotch law, the plaintiffs would, in Scotland, have the right of action for which they now contend here? This question must be answered according to the *lex fori*, which is here the law of Ireland. Irish law alone can regulate the parties, the procedure, and the form, in actions instituted here. Of course it might be another matter if it were shown that, according to Scotch law, the contract between the intending husband and wife would constitute a contract not merely between them, but also a contract between the husband and third persons named by the husband and wife to give with whom they had no direct concern. But would it not be as strange, or more strange, that the defendants should escape a liability clearly within the terms of their bond, and that they should get off scot-free from an obligation which they were paid to undertake?

The claim made in this suit is not at all unknown in our law. When rightly regarded the novelty is in the defence, which admits the bond, admits the loss, admits that it comes within the obligation, admits that the premium the defendants received covered the risk, and then claims to get out of the contract, on the ground that the mortgagor was not a party to the bond. It was not necessary that he should be a party, but he has rightly constituted this suit by joining the bank as co-plaintiffs, and in my opinion he should succeed. I accordingly think the appeal should be allowed with costs.

Fitz Gibbon, L.J.:—

The Master of the Rolls begins the judgment under appeal by describing this as a "novel case" and "a perfectly new cause of action," with "no authority directly bearing upon it."

effect to that contract. But as to this, I am willing to assume that the contract before us, construed according to Irish law, can be enforced in the Irish Courts, by an action properly brought by the present plaintiffs. I do not determine that they cannot maintain such an action, and therefore I do not deprive them of any possible advantage which the Scotch law, if it be as alleged, could give them.

Considering the case as one in which no evidence has been offered of any difference between our law and the Scotch law, the simplest form to which it can be reduced is this—A case where an intending husband has contracted with an intending wife and the unborn children of the marriage, that he will pay a certain sum upon his death to each child, with a declaration added that A B (not a party to the contract) shall have power to enforce it by action as trustee for the children. Assuming, but not deciding, that in such a case the "trustee" can maintain an action —Is the present such an action as he can maintain? Clearly not. It clears the matter to regard "law" and "equity" as still distinct. He cannot maintain any action at law. What action, if any, can he maintain in equity? Certainly not this action. He alone could not, in any proceeding known to our Courts of Equity, do what the plaintiffs here wish to do, namely, get the money into their own hands without bringing the beneficiaries before the Court. Under the circumstances of this case the beneficiaries would be

He concludes by regretting the result at which he has arrived, namely the dismissal of the action with costs, "as the Corporation gets off scot-free, although they received the premiums for undertaking the liability as surety to make good the receiver's default," which was ascertained by the Vice-Chancellor to have amounted to £667 17*s.* 3*d.*, and for the recovery of which the action has been brought by Charles Kenney and the National Bank as co-plaintiffs. But that the opposite opinion exists and commands respect, I should have thought the plaintiffs right to recover free from difficulty, and I cannot now say that I entertain any doubt in my own mind, that judgment ought to be given for the full amount of the receiver's ascertained default, as liquidated damages upon the breach of the condition of the defendants bond. The difference of opinion arises from the introduction of questions of equity and of trust, into a case which, in my opinion, ought to be primarily considered as a Common Law action upon a bond by obligee against obligor after condition broken. I may be wrong in my point of view. But from that point of view the grounds of the opposite conclusion are not visible, and much that

necessary parties to the discharge of the person liable to pay the money; the fund, if the beneficiaries as well as the party liable were before the Court, would be paid not to the trustee but to the beneficiaries, or the Court would see that it passed directly from him to them, or that it was brought into Court for them. The form of the action would be a suit to have the trusts of the settlement carried into execution. That is not the frame of the present action, for the plaintiffs, though only trustees, and claiming as such, have chosen to sue alone, and in contract. The reasons for leaving out the beneficiaries are sufficiently proved, and show that justice requires that the plaintiffs should not be permitted to succeed.

I further think that it was inferentially decided in the Scotch proceedings that the right to receive this money is in the beneficiaries, and not in the trustees alone, but it is not necessary to decide this.

There is yet another matter which we are not bound to determine, but which is, upon the terms of the contract, of great importance. The settlement seems to me to draw a distinction between the property which was vested in the trustees, and which was to be managed by them, and this fund of £500. As regards the covenant to pay this latter sum, the powers of the trustees, if any, would be entirely different from those which they possessed in regard to the property which was to pass through their hands, and which was to be administered by them. In order to "implement" or give effect to this is said in support of it is irrelevant. The obligee being a plaintiff, I fail to see how he can get less than judgment for nominal damages, or how the dismissal of the action with costs against *both plaintiffs*—the obligee included—can be sustained. The suit is framed as an action by the obligee, as the legal party to the contract, to recover the amount of the bond, joining as co-plaintiff the party who, upon the facts stated, is equitably and beneficially entitled, as between himself and his co-plaintiff, to the damages recoverable upon the breach of the bond. This being so, the want of privity, and the absence of the party to the contract, which have caused difficulty in other cases, do not exist. Furthermore, considerations as to the rights or liabilities of the plaintiffs *inter se*, or of the right or power of beneficiaries to recover alone, or to compel a legal contracting party to sue in their interest, do not arise.

Upon the terms of the bond itself, having regard to the facts which it recites, I hold that the measure of damages upon its breach is the liquidated amount of the default admitted, viz. £667 17*s.* 3*d.*, and further, on the terms of the bond, and on

covenant (his Lordship read the covenant, *ante*, p. 309) the only thing necessary would be to enforce payment to the children, either by a suit by the trustee to which the beneficiaries would be parties, or by an action by the beneficiaries, in which the trustees or some other person could sue as a next friend. This is not such an action, and, under the circumstances, we are not going to facilitate the plaintiffs.

On these grounds, which are in substance those which are better stated by the Chief Baron, I am of opinion that, according to Irish law, upon the facts disclosed, this action is not maintainable, and that the order appealed from should be affirmed.

Walker, L.J.:—

I entirely concur as to the point under the statute 22 & 23 Vict. c. 63, which, in my opinion, has no application here. There is nothing but a suggestion that there is a difference between the laws of Scotland and Ireland, and no proof whatever that any such difference exists.

If the matter is to rest on discretion, I, for my part, absolutely decline to exercise it now. Five actions have already been brought. I do not intend to add a sixth, nor can I conceive any reason for bringing this action in the interests of the persons entitled to the money.

Coming to the merits of the case, I am willing to assume that this is a the evidence, I hold that the amount is recoverable for the benefit of those to whom the receiver ought to have given the money, *i. e.* for the benefit of the estate, and under existing circumstances for the benefit of the plaintiff Kenney. Before discussing the effect of the bond, I must express my inability to find any evidence of anything peculiar, either in the form of this bond, or in the circumstances under which it was executed. It is a deed poll. It is not an indenture. No consideration moves from the bank. The receiver and the Assurance Corporation are the joint and several obligors; they are the only executing parties to the instrument, and they name the National Bank as the obligee. The purpose and extent of the obligation must be ascertained from its terms, as applied to a document of the class to which it belongs, and to the facts of the particular case. According to my experience, bonds for the faithful discharge of the duties of receivers are seldom, if ever, in any other form; they seldom, if ever, name as obligee more than some one person or party, who represents, or is interested in, the estate. The obligee may be a mortgagor or a mortgagee; under the old Chancery practice, he might be a Receiver Master; under the new practice he may be the Land Judge, or an officer of his Court. But in all cases the thing guaranteed is the faithful discharge

Scotch contract, but it is none the less perfectly clear that the Irish law must apply, as no evidence of any difference between the laws of the two countries has been given.

I shall assume in favour of Mr. Matheson that the last clause, in the covenant, is a declaration that the trustees are entitled to put in force every provision it contains, and it is not necessary to decide whether the trustees can enforce these provisions by a suit in the nature of one to carry out the trusts of the deed. It is very possible that they can do so; but I think, even assuming this to be so, there are two answers to the present action. There is a decree of the Inner House of the Scotch Court of Session, which I look upon as deciding this, as the trustees had claimed to retain this fund as part of the continuing trust. The House, by their decree, allowed the appellants to amend their claim, and then ranked and preferred the claimants, Mrs. White and Susannah Cuming, to one-third each of the sum of £500, with interest from Whitsuntide, 1890, the date of the father's death.

But looking at it as an action in this country, the form of this action is a complete answer; the beneficiaries are not parties; in no sense can such an action be maintained unless they were parties. Here they were, it seems to me, advisedly of the receiver's duties, the risk is the danger of his default; and the amount of the risk, by the terms of the bond, where the default is as here misappropriation of money, is the liquidated amount misappropriated up to the limit of the penalty. This is admitted to be the first case in which it has been contended that the liability upon such a bond can be affected or reduced by proof that the obligee, being a party interested in or representing the estate, had only a limited or conditional pecuniary and beneficial interest in the faithful discharge of the receiver's duties, or that the measure of damages or right of suing upon such a bond can depend upon the value or nature of the obligee's individual interest. But, however that may be, it seems to be assumed that the taking of this particular bond by the National Bank was in some way peculiar, and that it was taken somehow specially for the protection of the Bank's interest as mortgagee, and without regard to the interest of the mortgagor and others in the faithful discharge of the receiver's duties. There is no evidence to sustain this assumption. The only paragraph in "the admissions of facts" bearing on this subject is No. 10, "that Plunkett Kenney was not nominated receiver by the plaintiff Charles Kenney." The receiver was of course nominated by the mortgagee, under the statute. The mortgagee presumably nominated

left out for some reason best known to the plaintiffs, and I know of no rule of law or equity that could enable them to sustain the present action.

Holmes, L.J.:—

I concur with Walker, L.J., in doubting the power of this Court to state a special case for the opinion of the Scotch Court. It seems to be a necessary condition to the exercise of the jurisdiction conferred by the Act of 1859 that the law of Scotland should be different from that of Ireland on the point, in respect of which the opinion of the Scotch Court is required, and there is no evidence of any such difference in the present case. I also agree with him in holding that even if the power existed, it ought not to be exercised in the peculiar circumstances of this action.

We must, therefore, construe the marriage contract, which is the foundation of the plaintiffs' claim, by applying to it the canons of our own law. Now, I should be sorry to lay down without further consideration that if a husband and wife agree with each other before marriage that £500 shall be paid on the husband's death out of his assets for the benefit of their children, and they nominate certain persons as trustees for the purpose of securing that the money will be him on the ordinary terms of giving security. The defence states nothing more than the construction and effect of the bond, or the usual course, when it says that the bond was "granted to the plaintiffs, the National Bank, merely for their own protection as mortgagees," and that it "was not obtained in pursuance of any obligation or duty on the part of the Bank towards the plaintiff Charles Kenney, and it contains no trust or declaration for the benefit of Charles Kenney, who was not a party thereto, or for the benefit of any other person." Such bonds never do contain such provisions. The *motive* for taking the bond in the name of the Bank may have been "their own protection as mortgagees," but the *extent and operation* of the protection must be determined by the bond. The premium was payable in the ordinary way by the receiver. The amount of the premium was 2*s. per centum* upon £1478—the limit of the guarantee. The payment of the premium primarily fell personally upon the receiver, but he got his remuneration out of the estate, and thus the premium ultimately fell upon the rents and profits, for

forthcoming and duly applied, the trustees could not bring an action to enforce the stipulations. I don't think that any decision has gone so far as this, and I think that it would be a misfortune if this were found to be the law. But it is unnecessary for me to decide, or even consider the point at present, as I am of opinion that the Scotch judgment, which is of course binding on the parties to this action, has declared that the plaintiffs are not trustees for this purpose.

There is always some difficulty in construing a document abounding in the terms of art of a foreign law without the assistance of an expert; but in the absence of an expert I must try to do so. In process No. 7 of the Scotch suit the plaintiff Gemmell states his claim in the following words—"The claimant claims to be ranked and preferred as trustee to the whole funds *in medio* in order that he may administer and pay over the trust estate in terms of the said ante-nuptial contract of marriage." Olden, a grandson of the marriage, in process No. 8, states his claim "to be ranked and preferred to one-third share of the sum of £500"—that is the £500 sued for in this action—"together with interest on the said one-third share from the term of Whit Sunday, 1890, until paid." The two daughters do not make a similar claim in their original pleadings, as their case then was that the £500 was not payable at all. Lord Pearson, by his judgment, "ranks and prefers the claimant Olden to one-third share of this sum of £500, with interest from Whit Sunday, 1890, in terms of his claim, No. 8 of process, and *quoad ultra*, ranks and prefers the claimant Gemmell as trustee aforesaid, in terms of his claim No. 7 of process, and

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if the receiver had not undertaken to pay it, it might have been deducted from his poundage. The bond recites that the National Bank had "*approved* of the said Assurance Corporation *to be sureties* for the said Plunkett Kenney as such receiver in the said sum of £1478." This conveys that "approved security" was, as usual, a condition of the appointment.

Under these circumstances, there is nothing peculiar or exceptional in the case; it is the ordinary case of a receiver, in consideration of his employment, giving security by his bond with an approved surety for the faithful discharge of his duties, naming as obligee a person or party who represents or is interested in the faithful discharge of those duties. Such an obligee cannot be deprived of his right to judgment, for the amount of a default subsequently taking place in breach of the condition of the bond, by any consideration of circumstances tending to show that the pecuniary loss to himself is less than the amount which by the receiver's default has been lost to the estate. But the present defence goes even further. When the receiver first made default, the Bank took

decerns," etc. On the appeal from this judgment to the Inner House the two daughters were allowed to amend their claim by each claiming one-third share of the £500 in the same manner as Olden had done, and the interlocutor of Lord Pearson is altered by ranking and preferring the daughters to one-third each of the £500, with interest, from Whit Sunday, 1890, in terms of their amended claim, and *quoad ultra* the said interlocutor is adhered to. There is no obscurity about this. Mr. Matheson says that "rank and prefer" is equivalent to "declare entitled." I suppose it is. At all events, it must mean the same thing in the pleadings and in the judgment, and, if so, we find in a suit where Gemmell was claiming to be entitled to the £500 as trustee for the purpose of administering it according to the trusts, and the grandson and the daughters were claiming it as against him, the former failed and the latter succeeded. This must mean that Gemmell was not entitled to it as trustee, which puts him out of Court in the present action. Resting my judgment on this view of the Scotch proceedings, I am precluded from construing for myself the marriage contract. I may, however, say that if I were at liberty to do so, and if I were to hold that the plaintiffs are trustees who could maintain an action thereon, I would be disposed to agree with my colleagues that the present suit is defectively and improperly constituted.

Solicitors for the plaintiffs: *F. Gifford & Son.*

Solicitors for the defendants: *Stanuell & Son.*

R. D. M.

FitzGibbon, L.J.

proceedings before the Vice-Chancellor to ascertain the amount of the default. The Assurance Corporation intervened; they raised a defence, in which they failed, seeking to reduce or get rid of their liability on some point about dates, and the Vice-Chancellor judicially ascertained their liability, so far as that proceeding went, at £667 17*s.* 3*d.* At that time a considerable sum was still due to the Bank upon the mortgage; if the bond had been then in suit the present defence could not have been set up, because it did not then exist. The payments which paid off the mortgage were made, partly out of rents and profits by the receiver who succeeded Plunkett Kenney, and partly out of moneys produced by sale of the mortgaged lands, subsequent not merely to the breach of the condition of the bond, but subsequent also to the date, October 14, 1896, at which the Assurance Company duly put an end by notice to their further liability as sureties under the bond. The final payments were subsequent even to the Vice-Chancellor's ascertainment of the amount of the default. Therefore the novelty of the present defence is enhanced by the fact that it is a plea of matter subsequent to a judgment, and is a sort of plea *puis darrein continuance.* The defence could not have been raised at all, *either* if the action had been brought sooner, *or* if the receipt of the moneys which discharged the mortgage had been deferred until after the Bank had first recovered judgment on the bond.

In addition to all this, I read the bond itself as indicating that the guarantee is not limited to the interest of the obligee as mortgagee. I hold that it defines the duties, the faithful discharge of which it guarantees, and discloses the circumstances, in terms which prove that the guarantee was intended to operate for the benefit of all parties interested in the due discharge of the receiver's duties according to their several and respective interests.

The bond recites the deed of October 29, 1891, by which the Bank, *in pursuance of the powers given to them by the Conveyancing Act,* 1881, *section* 24, and of all other powers, had appointed Plunkett Kenney to be receiver over the Rocksavage estate. The condition of the bond is that the receiver shall, (1), Yearly, duly account to the Bank for all such rents and profits as he shall have received, or without wilful default might have received *out of the* *lands*; (2), and shall pay and apply, *as directed by said Act*, all sums of money at any time in his hands, or properly chargeable against him as such receiver; (3), and shall in all things faithfully discharge *all and every his duties as such receiver.*

Thus the bond shows on its face that the obligee is a mortgagee; that the receiver has been appointed under the Conveyancing Act, 1881; and that the duties, the faithful performance of which is guaranteed, are the duties directed by that Act. What are those duties? Towards whom—for whose benefit—are they to be performed?

Section 24, sub-section 8, supplies the answer—The receiver is to apply the money—(1), in discharge of rent and outgoings; (2), in keeping down annual sums and interest having priority to the mortgage in right of which he is receiver; (3), in payment of his own commission; (4), in payment of interest due under the mortgage; (*lastly*), he is to pay the residue to the person who but for the possession of the receiver would have been entitled to receive the income of the mortgaged property, i.e. *in this case to the plaintiff Charles Kenney*: thus, upon its face, it is a bond for the discharge of a duty to Charles Kenney the mortgagor.

But then it is said that people who lost head-rents, or other prior charges, can not be within the protection of the bond. It may be that privity with the estate would be necessary, though I do not see why a landlord might not get the Bank to put the bond in suit, to recover money which would go to pay rent. But the objection goes too far. Can it be that if the estate was insolvent, the guarantee Company could plead to an action by the Bank, "You have lost nothing, for if we pay up the receiver's default, the money must go to pay prior outgoings and charges, and your mortgage can in no event be reached." If the defence be good that the bank has lost nothing because it has been paid in full, it must be equally good that it has lost nothing by the receiver's default, because nothing that he received, or might have received, could have reached the Bank. Such a defence would be plainly repugnant to the intention of the bond. But it is enough for us to say that the mortgagor is, as I have shown, within that intention.

One more observation on the bond. It is *a joint and several* *bond* of the receiver and his surety. Can the liability, or the measure of damages, be different as against one obligor and the other? If the judgment of the Master of the Rolls be right, an action brought against the defaulting receiver upon this bond must equally have been dismissed.

The provision in the Conveyancing Act, 1881, upon which the Master of the Rolls chiefly relies, appears to me to lead persuasively to the opposite conclusion. The Act, section 24, sub-sect. 2, provides that "the receiver shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides." Under this provision, the risk against which this guarantee was given could not fall primarily, or to its full extent, upon the Bank. Therefore, if the judgment appealed from is right, the Assurance Corporation ought to have had some equity to compel the obligee to exhaust his remedies against the mortgagor, as the person primarily liable for the receiver's default, before compelling the surety to make good the defalcations. At all events, there ought to have been some equity to compel the obligee to account for any money recovered from the mortgagor, or out of the lands, in reduction of the guarantee, and an equal equity to recover back the amount of any loss subsequently recouped, and to prevent the obligee from suing in the interest or on behalf of the mortgagor.

These are indeed novel contentions, and unless they can be sustained, the judgment appealed from must be wrong. That judgment introduces into actions upon fidelity bonds a measure of damages hitherto, so far as I know or believe, unknown. It makes the damages dependent, not upon the amount to which the guaranteed person has made default in breach of the condition, but upon how much of that default has ultimately fallen upon, and become an otherwise irrecoverable money loss of, the obligee, and upon his having recouped himself, or being able to recoup himself, out of the rest of the property. If this be right, in every such case, whether tried by a jury or in Chancery, an inquiry ought to be directed to ascertain how much of the misappropriated money has been, or may be, made good to the obligee from some other source. Such an inquiry, in my opinion, contradicts the contract;

it turns a bond to secure a liquidated sum—namely, the misappropriated sum—into a security for an unascertained and probably unascertainable amount—namely, the value or amount of the obligee's interest in the faithful discharge of the guaranteed duties. From the absence of any precedent for it, I draw support for my clear opinion that such an inquiry would be wrong.

The right in the present case is not complicated by any difficulty of parties, because the National Bank is a co-plaintiff. This relieves us, as we were relieved in *Drimmie* v. *Davies* (1), from any question about the maintenance of the action upon the contract. But I believe that, under the Judicature Act, it would be competent for a beneficiary, in the position of the mortgagor, to sue as sole plaintiff, making the obligee a co-defendant with the obligor, and claiming the benefit of the contract as one made for the benefit of the mortgagor. Under the former and stricter system, there was a recognised equity to obtain the right to sue in the name of the obligee upon a bond, and a suit for that purpose was familiar to Equity Jurisprudence. In the case of Chancery receivers the motion for leave to put the bond in suit was one of frequent occurrence. It could be made by any one who, by enforcing the bond, could obtain all or any part of the sum to be recovered; it was never heard of that the amount recoverable depended on the personal or pecuniary interest of the obligee alone, in enforcing a security taken for the faithful discharge of the receiver's duties.

If I am right in holding that this contract, according to its terms and to the intention of the parties, enured, under the circumstances, for the protection and benefit of the mortgagor, this last point becomes merely one of form, and equity would never allow the right to be left without a remedy.

If we remember the innumerable cases in which the amount of default has been made good by sureties upon fidelity bonds, they paying the ascertained amount of the default, on which they had received their premium, without raising any question about the ultimate distribution of the money among the losers, the novelty of the present defence appears to me to be accounted for more naturally by regarding the Employers' Liability Assurance Corporation, Limited, as being the first—in the words of the Master of the Rolls—"to attempt to get off scot-free, although they received the premiums for undertaking the liability," than by assuming that all previous claims were paid in error, or in excessive liberality, and that all previous insurers mistook the measure of damages, and the risk attending their guarantees, to their own detriment.

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(1) [1899] 1 I. R. 176.

In my opinion, the plaintiffs are entitled to judgment, with costs here and below, for the amount of the receiver's default, as ascertained by the Vice-Chancellor.

WALKER, L.J. :—

The plaintiffs in this action are Charles Plunkett Kenney, a mortgagor, whose mortgage had before this action been paid off, and the National Bank, former mortgagees of C. P. Kenney, who having been paid off before the institution of the action, had no interest in the litigation, but lent their names as nominal plaintiffs, on, no doubt, an indemnity; and the defendants are a Company who, at the request of the mortgagees, guaranteed by bond the due application of rents received by one Plunkett Kenney, a receiver appointed by the mortgagees under the statutory powers vested in them by the Conveyancing Act. The mortgage, which bears date the 16th November, 1888, was made by C. P. Kenney to the bank of an estate called Rocksavage, to secure £4738 14*s.* 5*d.* and interest and further advances. The interest fell into arrear, and on the 30th June, 1891, there was due in respect of it to the bank £379 19*s.* 6*d.*

Accordingly, the bank thought it for their interest to exercise their statutory powers of appointing a receiver, and they did so by a deed poll dated the 29th October, 1891. By this the bank, in pursuance of the powers given them by section 24 of the Conveyancing Act, appointed Plunkett Kenney to be the receiver of the rents and income of the lands and perpetual rents comprised in the mortgage, "with all the powers conferred on a receiver by the said Act, and to the intent that he shall apply all moneys received by him in the manner directed by sub-section 8 of the said 24th section of the said Act," and his commission was fixed at £5 per cent.

The mode of application directed by the Act, and thus incorporated, was—

1. In discharge of all rents, taxes, rates, and outgoings.

2. In keeping down all annual sums or other payments and interest on all principal sums having priority to the mortgagee.

3. In payment of his commission and premiums on insurances, and cost of executing necessary repairs directed by the mortgage.

4. In payment of the interest accruing due under the mortgage.

5. In payment of the residue to the person entitled, subject to the mortgage.

Before we pass to consider the bond, which must be read in connection with the deed, it is necessary to see what rights the deed created, and as between what persons. The receiver was appointed by the mortgagees alone, and for their own convenience, and, I add, only for their interest. He was, under the statute, the agent of the mortgagor, and the mortgagor became solely responsible for his acts or defaults. The deed contemplates the receiver making payments to—amongst others—the owners of head rents, and also persons entitled to interest on prior mortgages, as well as, and just as much as, the person who happens to be entitled to the surplus; and if the argument of the appellant's counsel be correct, the owner of such head rent, and a prior mortgagee, have each independent rights of putting in force the provisions of the deed, and compelling the mortgagees—the bank—to put them in force the same as the mortgagor has. In other words, the deed created a series of binding trusts for a number of persons which all these were interested in, and which as a consequence could not be varied or cancelled.

The bond, which merely repeats the provisions of the deed and creates security for the discharge of the duties under it, has now to be considered.

The bank, as a condition of appointing Plunkett Kenney, required him to procure security for his due accounting, and the due application of the rents as directed by the Act; and accordingly this was done by the bond of the defendants dated the 29th October, 1891, by which Plunkett Kenney and the defendants became bound jointly and severally to the bank in the sum of £1478. The condition of the bond, which recited the appointment under the Conveyancing Act, was in the following terms:—"If the above-named Plunkett Kenney do and shall, on or before the 30th day of April, 1892, and thereafter, yearly, duly account to the said bank, such account to be verified by declaration, for all such rents and profits as he shall have received, or without his wilful default might have received out of the said lands and premises over which he has been so appointed receiver, and shall pay and apply as directed by said Act all such sum or sums of money as shall at any time or times be in his hands or properly chargeable against him as such receiver, and shall in all things diligently and faithfully perform and discharge all and every his duties as such receiver without any wilful default."

The bond also contained a stipulation for payment by the receiver to the defendants of an annual premium of £14 15*s.* 6*d.* with a right of terminating the security if it were not paid, and under this power the defendants terminated the security on the 14th October, 1896.

The mortgagor was not in any way in privity with this security, required and obtained by the bank. The bank procured it solely for their own benefit, and without any object of securing the mortgagor, who as between mortgagor and mortgagees was solely responsible for the receiver's acts and defaults. The object of securing owners of head-rents or prior mortgagees is equally, if not more, repugnant to any intention which can reasonably be attributed to the bank. The receiver did not account or apply the rents as required by the terms of his appointment, and on the 30th January, 1897, the bank issued a writ against him, upon which an order to account was made on the 8th March, 1897, and on the 15th June, 1898, a final order was made by the Vice-Chancellor directing that Plunkett Kenney should pay to the bank the sum of £667 17*s.* 3*d.*, the balance certified to be due by him.

It would appear that this liability could not be realized from Plunkett Kenney. The bank proceeded in the Court of the Land Judge, and partly through a receiver appointed by him in succession to Plunkett Kenney, and partly by sales of the estate, were paid, before this action, all sums due by Plunkett Kenney, so far as they were concerned, and all principal and interest due upon the mortgage.

On the 8th May, 1900, the mortgagor brought this action against the Guaranteeing Company, claiming a declaration that he, as mortgagor, was entitled to the benefit of the bond of the 24th October, 1891, and also that the defendants are liable to indemnify him in respect of the sums received by the receiver, and not applied in accordance with the terms of the bond, and the provisions of the Conveyancing Act, 1881.

I am of opinion that the Master of the Rolls was right, and that the mortgagor has no equity to obtain the relief he seeks. If the bond had not been executed, I do not think it could be contended successfully that the mortgagor had any right to compel the mortgagees to sue Plunkett Kenney for his defaults. The mortgagor was responsible for such as between him and the mortgagees, and the bank owed him no duty in respect of them, or of the debt created by reason of them, no more than I think he owed a duty to the other members of the class I have mentioned. Then take the case of the bond. It was obtained by the mortgagees at their sole option, and solely for their own security. They might have cancelled it any time. The statute says the mortgagee may remove the receiver and appoint another, and the mortgagees were at liberty to pursue all their remedies against the mortgagor, independently of it, as they in fact did.

I adopt from the clear judgment of Lord Justice Holmes, which I have had the benefit of seeing, certain conclusions which he draws, and with which I agree—1, that the security was obtained by the mortgagees for their own convenience and security; 2, that the mortgagees owed no duty to the mortgagor in connection with the obtaining of it; and, 3, that they could not be compelled by the mortgagor to put the bond in suit. But, nevertheless, it is said that on the terms of the bond, it must be taken to have been obtained for the benefit of the mortgagor in part, and that, upon the authority of such cases as *Lloyds* v. *Harper* (1), and *Drimmie* v. *Davies* (2), decided by

(1) 16 Ch. D. 290.

(2) [1899] 1 I. R. 176.

this Court, the mortgagee is entitled to the benefit of the bond. Such a right would, in my opinion, exist, and only exist, if the mortgagor were a *cestui que trust* of the security, or, to put it in other language, if the security were obtained for his benefit as an object of it, and, if that were the true position, the *cestui que trust* could sue independently in his own name, and, if necessary, compel the person who made the contract for his benefit to sue or join in suing.

It is not suggested that the doctrines applicable to the relation of principal and surety enter into this case, and it is inconsistent with the position of the mortgagor towards the mortgagee to suppose that they apply. The argument must rest upon the other ground, that the mortgagor was a *cestui que trust*, or object by contract of this bond, in the sense of being a *cestui que trust* of it. The cases which have been cited establish the doctrine and the limits of it: *Gandy* v. *Gandy* (1), was a case of a separation deed between husband and wife, by which the husband covenanted with the trustees named in it, to pay them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters. One of the youngest children sued the husband—making the trustees defendants—for performance of this covenant. It was held she could not maintain the suit, on the ground that the covenant as regards the children was not to give them any benefit by way of any beneficial right. The claim was then amended by making the wife a co-plaintiff, and it was held that she could sue. The rule of law is stated by Cotton, L.J.:—"Of course, as a general rule, a contract cannot be enforced except by a party to the contract, and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception; if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as a *cestui que trust* under that contract, then B could in a Court of Equity be allowed to insist upon and enforce the contract." Bowen, L.J., after referring to *Tweddle* v. *Atkinson* (1), says:—"Whatever may have been the common law doctrine, if the true intent and true effect of this deed was to give to the children a beneficial right under it, that is to say to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would in a Court of Equity be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course, depends upon its being made out that, upon the true construction of this deed, it was a deed which gave the children such a beneficial right." Applying those principles, they decided the youngest children could not sue, but the right of the wife to sue was, by their subsequent decision, grounded upon this—"the covenant is entered into with the trustees as representing her."

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(1) 30 Ch. D. 57.

In *Lloyds* v. *Harper* (2), Lloyds were held entitled to sue, upon the same principle, on a guarantee given to the committee of Lloyds. All the engagements covered by the guarantee were either engagements with subscribers to Lloyds, or engagements with strangers made through the intervention of subscribers to Lloyds. Therefore it was held, that Lloyds had entered into the contract as trustees for those classes, and could recover substantial and not merely nominal damages. Cotton, L.J., says: "The plaintiffs are suing here as trustees for the benefit of all those with whom Mr. Harper, junior, entered into contracts of insurance."

Though Lush, L.J. uses more general language; he says, "I consider it to be an established rule of law that where a contract is made with A, for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered"—and further on he says, "The very object of making them" (Lloyds) "the parties to the contract was that they should recover for the benefit of all the persons who had sustained losses upon the default of Robert Henry Harper." That case proceeds on the same principle as *Gandy* v. *Gandy* (3). In *Drimmie* v. *Davies* (4), there was a

(1) 1 B. & S. 393.
(2) 16 Ch. D. 290.
(3) 30 Ch. D. 57.
(4) [1899] 1 I. R. 176.

partnership agreement entered into between a father and son for five years, and the agreement contained a provision that if the father died during the term, the son should pay to each of his three sisters and two brothers a certain annuity. The father died within the term, having made a will appointing executors, and those executors and the five brothers and sisters sued the son for performance of the agreement to pay the annuities, and it was held that the action could be maintained by the plaintiffs, and also, I think, by either set of plaintiffs. There the brothers and sisters were plainly *cestuis que trust* of the covenant.

The origin of these rules is to be found in the case decided by Lord Hardwicke in 1756: *Tomlinson* v. *Gill* (1), where the defendant Gill promised the widow of an intestate that if she would permit him to be joined with her in the letters of administration of his assets, he would make good any deficiency of assets to discharge the intestate's debts, and creditors filed their bill to enforce satisfaction of their debts from Gill, and Lord Hardwicke made a decree saying " The plaintiff is proper for relief here; he could not maintain an action at law, for the promise was made to the widow, but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them." On the other hand, I think it is equally clear that when a contract is made between two persons, and a benefit under it is claimed by persons who are strangers to the contract, such a claim cannot be maintained by them in equity, unless such persons are *cestuis que trust*, *i.e.* as stated by Bowen, L.J., in *Gandy* v. *Gandy* (2), where upon the true construction of the instrument it conferred upon those persons a beneficial right; and also, a party to the contract who sues the other party, not for any right of his own, but to recover damages for persons not parties, cannot succeed unless he was named as trustee for said other parties, in other words the right of the supposed trustee who is a party to the contract, and the rights of the supposed *cestuis que trust* are correlative, though the rights of the latter could only be enforced on equitable doctrines.

Sir George Jessel, M.R., puts this side of the doctrine very clearly in *In re Empress Engineering Company* (1). He says, " A

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(1) Ambl. 330. (2) 30 Ch. D. 57. (3) 16 Ch. D. 125.

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mere agreement between A and B, that B shall pay C (an agreement to which C is not a party either directly or indirectly) will not prevent A and B from coming to a new agreement next day releasing the old one. If C were a *cestui que trust* it would have that effect. I am far from saying that there may not be agreements which may make C a *cestui que trust*. There may be an agreement like that in *Gregory* v. *Williams* (1), where the agreement was to pay out of property, and one of the parties to the agreement may constitute himself a trustee of the property, for the benefit of the third party. So again it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person."

Let us now apply the tests furnished by the authorities to the case before the Court—was it the object or intent or effect of the deed and bond, according to their true construction, to confer a beneficial right upon the mortgagor, or to make the mortgagees in any sense trustees for the mortgagor? I have already observed upon the position under the deed of other persons to whom payments are to be made.

No doubt by the reference to the manner directed by the Act, in providing for the application of rents, it incorporates that branch of the application which provides for the application of surplus rents, so it does the application of rents to the other classes, but the same Act, which is incorporated in both deed and bond, frees the mortgagee from any duty or responsibility or contractual relation as regards the mortgagor. All losses and defaults are thrown on him, and it cannot be intended that the mortgagee desired to involve himself in the relations between the mortgagor and the receiver. He obtained the security without reference to the mortgagor, and probably without his knowledge, and owed him no duty in respect of it, and could have dispensed with the security altogether, or done away with it next day, thus showing the mortgagor had no interest in it. This is the point referred to by Sir George Jessel, in *Empress Engineering Company* (2). He could not have been compelled to put the bond in force against the receiver; the mortgagor is the principal debtor all through, and his indebtedness to the mortgagee is only in result measured by the payments which the mortgagor makes either by his own hands or by his imputed agent the receiver. There is nothing from which it can be inferred that the benefit of the mortgagor was in any way in contemplation. The object of the mortgagee was solely to protect his own interest, and guard against the loss which, directly or indirectly, might fall upon him by putting a receiver in receipt of the rents, and this is natural, though the mortgagor and the mortgagor's estate were still between him and ultimate loss. The mortgagor indirectly gets a benefit from the due application of the rents, but it is not from his being a *cestui que trust*, or object of the bond or deed. If he was not a *cestui que trust*, the mortgagee cannot be a trustee for him, and therefore when the mortgagee was paid off, as he was before action, the mortgagor could recover nothing on that which was solely the security obtained by and held for the benefit of the mortgagee.

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(1) 3 Mer. 582.

(2) 16 Ch. D. 125.

I am of opinion that neither the mortgagor, or, on the facts, the mortgagee who was paid off, could separately maintain this action, and if that be so, they could not maintain it together.

The security which that mortgagee in this case obtained for his own benefit is very like an insurance against fire which a mortgagee would effect at his own option and for his own purposes, if the property was house property, and in such a case I think the mortgagee would have no equity in respect of the insurance money or its application, though he might indirectly benefit by its receipt; see in the case of landlord and tenant: *Leeds* v. *Cheetham* (1) and *Lofft* v. *Dennis* (2).

In my opinion, the appeal should be dismissed.

Holmes, L.J.:—

The Master of the Rolls described this as a novel case; and I may add that, probably, on account of its novelty it appears to me to be a case of considerable difficulty.

All the material facts are admitted. Charles Kenney mortgaged his lands of Rocksavage to the National Bank to secure the sum of £4738 or such further or other sums as might thereafter become due. The interest on the mortgage debt having been allowed to fall into arrear and the mortgagee being entitled to appoint a receiver pursuant to the provisions of the Conveyancing and Law of Property Act, 1881, appointed Plunkett Kenney receiver. Although Plunkett Kenney was the son of the mortgagor, he was not nominated by the latter, who it must be assumed had nothing to do with the appointment. The mortgagee, as security for the faithful discharge by Plunkett Kenney of his duties as receiver, took from him and the defendant Company a joint bond in a form to which I shall presently refer. Plunkett Kenney subsequently made default in the sum of £667, but before any effective steps were taken to enforce payment from either of the obligors, the entire amount due under the mortgage was discharged partly out of subsequent rents and partly out of the proceeds of a sale of portion of the mortgaged premises.

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(1) 1 Sim. 146.

(2) 1 Ell. & Ell. 474.

Under these circumstances this action has been brought to recover the sum in default from the defendant Company, it being admitted that, although both the mortgagor and mortgagee are joined as plaintiffs, the suit is for the sole benefit of the former. The foregoing statement will serve to show the novelty and difficulty of the case. The plaintiff with whom the defendant entered into the contract sustained no damage; the loss fell entirely on the other plaintiff, who was no party to it. If it were a contract to indemnify the mortgagee against the consequences to him of the default of the receiver, the action cannot be supported; but this is a point upon which the condition of the bond must speak for itself. After reciting the appointment of Plunkett Kenney as receiver in pursuance of the powers given by the Conveyancing and Law of Property Act, 1881, the condition upon which the obligation is to become void is stated in the following words, "if Plunkett Kenney do and shall before the 30th day of April, 1892, and thereafter, yearly, duly account to the said bank (such account to be verified by declaration) for all such rents and profits as he shall have received or without his wilful default might have received out of the said lands and premises, and shall pay and apply as directed by the said Act all such sum or sums of money as shall at any time or times be in his hands or properly chargeable against him as such receiver, and shall in all things diligently

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and faithfully perform and discharge all and every his duties as such receiver without any wilful default."

The 24th section, sub-section 8, of the Act of 1881 directs the application by the receiver of money coming into his hands, and must be read into the condition. It is to be applied—1, in discharge of rents and other outgoings affecting the mortgaged property; 2, in keeping down all annual and other payments and the interest on prior charges; 3, in payment of the receiver's commission, of premiums on insurances properly payable under the mortgage deed and the statute, and of the cost of executing necessary and proper repairs; 4, in payment of the interest accruing due in respect of any principal money due under the mortgage; and 5, in paying the residue to the person who but for the possession of the receiver would have been entitled to receive the income of the mortgaged property or who is otherwise entitled to that property.

A bond subject to such a condition is neither in terms nor substance a contract of indemnity. It is an undertaking that a person authorised to collect money will apply it when collected to certain specified purposes in some of which the other contracting party has no personal interest.

Before referring to the legal nature and consequence of an obligation of this kind, I desire to free the case from one or two matters to which prominence has been given during the argument. I attach no importance to the fact that the defendant Company entered into the bond in consideration of a money premium. I regard this as immaterial and accidental. It was a matter of arrangement between the mortgagee and the receiver how the latter would give security for the faithful discharge of his duties. He paid the premium out of his own resources; and I am unable to see how a corporation becoming surety in this way stands in a different position from a friend who undertakes the obligation from a feeling of personal regard.

Furthermore, I am of opinion that the mortgagee owed no duty to the mortgagor in connection with obtaining security. He might have appointed the receiver without it; he might, I think, have cancelled the bond before breach of the condition or released the cause of action after breach; and it may follow that he could not be compelled by the mortgagor to put the bond in suit.

There are cases in which one of two contracting parties constitutes himself a trustee for others, and the contract is entered into on this basis. In such circumstances the trustee is bound to act in the interest of the beneficiaries; and if he is slack or careless, may be compelled to do so. But such is not the relationship of mortgagee and mortgagor; and although the bank may be at liberty to use the bond given by the defendant Company so as to benefit the mortgagor, it must, I think, be assumed that in requiring its execution the mortgagee was looking to his own interest and convenience. The question, however, still remains, what is the measure of the obligation imposed by it? It appears that on the 14th October, 1896, Plunkett Kenney was a defaulter to the extent of £667. If this sum had been properly applied by him, £339 of it would have gone to the payment of head rents, tithe rentcharge, and income tax that had become due up to that date, and the remainder would have been applicable to the payment of interest on the bank's mortgage, of which £443 was then in arrear. Now, I suppose it cannot be denied that if the bank had then put the bond in suit, it would have been entitled to judgment for the full sum of £667. But the whole of this when recovered would have enured for the benefit not of the mortgagee but of the mortgagor. The mortgaged estate was solvent; the bank has received thereout the amount due without being obliged to enforce payment of the £667; and the only result of recovering on the bond would have been to relieve the mortgagor's property to the extent of what would have been thus realized.

Let me now assume, by way of illustration, that the receiver had paid out of the rents collected by him all the outgoings of the property, and discharged in full the interest due to the bank, but had applied to his own use a considerable surplus that would have been payable under the condition of the bond to the mortgagor. Could this sum have been recovered by the mortgagee? There is no doubt that the contract embodied in the bond was that the receiver should so apply the money; and it seems to me that if the obligee would not be entitled to sue for the amount, it would follow that our law does not recognize a contract by which one of the contracting parties agrees with the other to pay a sum of money to or perform services for a third person. But there is nothing illegal or contrary to public policy in such a contract. Why, therefore, will not an action lie for its breach? In *Lloyds* v. *Harper* (1), Lusk, L.J., deals with this point in language as clear as it is decided. "The next question, which no doubt is a very important and substantial one, is that Lloyds having sustained no damage themselves, could not recover for the losses sustained by third parties by reason of the default of Robert Henry Harper as an underwriter. That, to my mind, is a startling, and an alarming doctrine, and a novelty, because I consider it to be an established rule of law, that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered, if the contract had been made with B himself." This Court had recently occasion to consider a similar question in *Drimmie* v. *Davies* (2). In that case by deed of partnership between a father and son, it was agreed that in the event of the death of the father, while the partnership still continued, the son would pay certain annuities to his brothers and sisters. The action was brought by the executors of the father and the brothers and sisters to enforce payment, and it was held that the plaintiffs were entitled to succeed.

Tweddle v. *Atkinson* (3), was relied on by the defendant in the argument in that case; but it was pointed out that it only decided that the person who was to receive the benefit, not being a party to the contract, could not sue.

"The first question," said Fitz Gibbon, L.J., "is whether the executors can sue. I see no reason to doubt that they can sue at Common Law. It is the same as the common contract which a man makes with an Insurance Company for payment of an annuity or lump sum to his widow or to his children after his death."

I am of opinion that the bond in the present case comes within the same principle, nor do I think that this would be doubted, were it not for the relation of mortgagor and mortgagee

(1) 16 Ch. D. 290. (2) [1899] 1 I. R. 176. (3) 1 B. & S. 393.

that exists between the two plaintiffs. If, for example, the condition had been to pay out of the surplus rents interest on a *puisne* mortgage, and the receiver had made default therein, it would be hard to maintain that the obligor could not recover; but it is said that a difficulty is created by sect. 24, sub-sect. 2, of the Act of 1881, which provides that a receiver appointed by a mortgagee "shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides." It is argued that as the mortgagor is himself primarily responsible for the defaults of the receiver, he cannot be indemnified at the expense of a surety. There is, I think, some confusion of ideas at the root of this argument. The defendant Company was not surety for the mortgagor but for the receiver, and by the terms of the contract undertook that the receiver would do his duty to both mortgagee and mortgagor. No doubt as between the two last-named, the latter was to be responsible for the receiver's acts and defaults; but the surety must be assumed to have been aware of this when he entered into the bond, and yet he accepted the obligation in the form in which it stands. I understand the defendants' case, if it can be shown that the condition of the bond was to save harmless the bank from the consequences of any default by the receiver. The bank has not been damnified, and a condition in that form has not been broken. I cannot, however, conceive any mortgagee taking such a security for the faithful discharge of a receiver's duties, as the right to recover in such a case would depend not upon proof of default, but upon, whether by reason of the default, the mortgage debt was put in peril. The bank in this case has been too well advised to allow itself to be thus embarrassed. The terms of the contract made with it by the defendant Company are free from all ambiguity, and I am of opinion that it is entitled to recover the full amount sued for. It may be asked, would the bank be at liberty to retain for its own use the sum recovered. The answer is an emphatic negative. I have already given my opinion that the mortgagee could not be compelled to put the bond in suit. He is free to enforce his contract or not, as he pleases; but it does not follow that he has the same freedom over moneys received by him by virtue of the contract. In the events that have happened, the entire £667, if it were now in the hands of the receiver, would be payable to the mortgagor, and if the mortgagee enforces payment from the receiver or his surety, he holds it for the use of the mortgagor whose property it is.

There is no inconsistency between a right of action being under the complete control of a litigant and the fruits of the action being held by him for the benefit of a third party. For these reasons I am of opinion that the appeal ought to be allowed.

Solicitors for the plaintiffs: *J. & L. Scallan & Co.*
Solicitor for the defendants: *R. H. Beauchamp.*

R. D. M.

M. R.
1900.
March 13.

IN THE MATTER OF THE DUBLIN UNITED TRAMWAYS COMPANY (1896) LIMITED; AND IN THE MATTER OF THE COMPANIES ACTS, 1862 TO 1898.

Practice—Procedure—Company—Contract—Memorandum in lieu of contract—Filing of—Application for relief by Company—Form of order and memorandum—Companies Act, 1898 (61 *&* 62 *Vict. c.* 26), *sect.* 1.

A tramway Company was registered under the Companies Acts in 1896 to take over the undertaking of an existing tramway which had been incorporated by Act of Parliament. By the articles of association of the new Company the shareholders of the old Company were entitled to exchange their fully paid shares for fully paid 6 per cent. preference shares in the new Company of like amount. A circular letter enclosing a form of agreement was sent to each shareholder of the old Company for signature by the directors of the new Company in order to carry out the above arrangement, and the forms of agreement so sent out were signed by all the shareholders except three, and fully paid preference shares in the new Company were allotted to them.

By inadvertence the forms of agreement issued were not registered pursuant to section 25 of the Companies Act, 1867. Owing to the deaths of several of the shareholders, and to the number of signatures which would have to be obtained, it was impracticable to file a contract pursuant to the said Act.

The Court, on motion made on behalf of the Company, made an order under sect. 1, sub-sect. 4 of the Companies Act, 1898, directing the filing of a memorandum in writing, in a form approved by it, specifying the consideration for which the shares were issued, to operate as if it were a sufficient contract in writing within the meaning of sect. 25 of the Companies Act, 1867.

Form of order and memorandum under the Act.

In re Whitefriars' Financial Company, Limited ([1899] 1 Ch. 184), followed.

Motion.

This was an application by the Dublin United Tramways Company (1896) Limited, for an order that pursuant to the provisions of the Companies Act, 1898, the Company might be at liberty to file with the Registrar of Joint Stock Companies in Ireland, a memorandum in writing in the form set out in the Schedule to the notice of motion, or in such other form as might be approved of by the Court, and that the Court might direct that, upon such memorandum being filed within twenty-eight days from the making of the said order, it should in relation to the shares mentioned or related to therein operate as if it was a sufficient contract in writing within the meaning of section 25 of the Companies Act, 1867, and had been duly filed with the Registrar aforesaid before the issue of the said shares, or that such further or other order might be made as the circumstances of the case might require.

The circumstances which made the application necessary were deposed to, in an affidavit by the secretary of the Company, and were as follows:—

The Company was registered on Sept. 28th, 1896, with a capital of £1,200,000 divided into 60,000 6 per cent. preference shares of £10 each, and 60,000 ordinary shares of £10 each. Article 6 of the Company's articles of association provided that the preference shares were to be issued as fully paid, and given in exchange for fully paid up ordinary shares of a like amount of the Dublin United Tramways Company, which had been formed under an Act of Parliament called The Dublin United Tramways Act, 1881, (44 & 45 Vict. c. cxl, local and personal). The capital of this Company (called for shortness the old Company), consisted of 60,000 shares of £10 each, the entire amount of which was issued, and the shares were fully paid up, and held by 2611 shareholders. The 1896 Company (called for shortness the new Company), was formed to effect an amalgamation between the Dublin United Tramways Company and the Dublin Southern District Tramways Company, and to take over the undertakings of these Companies. In September, 1896, a circular letter was prepared, and sent to each shareholder in the old Company for the purpose of carrying out the exchange of the ordinary shares in the old Company for preference shares in the new Company, in accordance with article 6 of the articles of association of the new Company. In reply to this circular all the shareholders in the old Company, except three, who could not be traced, agreed, and ultimately exchanged their ordinary shares in the old Company, all of which were fully paid up, for fully paid up 6 per cent. preference shares of the same number and amount in the new Company. The shareholders having signed the form of agreement sent out with the said circular, preference shares were issued to them, but it was not till December 6th, 1898, that the last of the shareholders in the old Company, with the exception before mentioned, sent in their original certificates and signed the form before referred to, to exchange their shares in the old Company for preference shares in the new Company. Preference shares were duly alloted to the said shareholders by the directors of the new Company, but no further agreement was ever entered into between the owners of the said shares and the new Company with reference to the exchange of shares, and consequently no contract was filed with the Registrar of Joint Stock Companies. The directors of the new Company were never advised, nor were they aware, that any further agreement was necessary to comply with section 25 of the Companies Act, 1898, and were under the impression that the agreements sent out with the said circular and signed by the shareholders were sufficient. The sufficiency of the said agreements was afterwards called in question by the Stock Exchange, when it was asked to give a day for the settlement for the said fully paid up 6 per cent. preference shares; counsel's opinion was taken, and he advised that a list of the fully paid up 6 per cent. preference shares should be registered in accordance with section 25 of the Companies Act, 1867, and that to effect this object an application should be made to the Court for an order under the Companies Act, 1898. The new Company paid regularly a 6 per cent. dividend on the preference shares, and a dividend on the ordinary shares. It was difficult, if not impossible, to obtain the execution of a contract which would comply with the requirements of section 25 of the Companies Act, 1867, owing to the fact that many of the shareholders in the old Company were dead, and because of the very large number of signatures, over 2611, which would have to be obtained.

A question arose as to what should be the proper amount of stamp duty on the several separate agreements entered into by the shareholders of the old Company; the matter was referred to the Commissioners of Inland Revenue, who decided that each agreement was liable to a sixpenny stamp, and not having been stamped from day to day, as they came in from the shareholders, a penalty of sixpence per agreement was inflicted, with the result that the agreements were all fully stamped. The total duties and penalties amounted to the sum of £214 9*s.* 6*d.* and was paid to the Inland Revenue on the stamping of the same. The memorandum and articles of association of the new Company, the last balance sheet, and list of shareholders who had signed the agreements were produced in Court.

John Gordon, Q.C. (with him *J. Fitzgerald Murphy*), in support of the motion :—

The facts stated in the affidavit of the secretary bring the case within section 1, sub-sect. 4, of the Companies Act 1898 (61 & 62 Vict. c. 26). The application is properly made on motion. A similar order was made by Kekewich, J. in *In Re Whitefriars Financial Company, Limited* (1). There the application was made by some of the shareholders; here it is made by the Company, who represent nearly all the shareholders.

The Master of the Rolls made the following order :—

> "The Court being satisfied that it is just and equitable to give relief in respect of the issue of the shares in the memorandum in the schedule to this order referred to without filing any contract, and that it is impracticable to file a contract pursuant to section 25 of the Companies Act, 1867, and having approved

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(1) [1899] 1 Ch. 184.

M. R.
1900.

In re DUBLIN UNITED TRAMWAYS Co. (1896), LIMITED.

of the memorandum (a copy of which is set forth in the schedule hereto) as a proper memorandum to be filed in lieu of such contract, doth pursuant to the Companies Act, 1898, order that the said Company do within twenty-eight days after the passing of this order, file such memorandum with the Registrar of Joint Stock Companies, and it is ordered that such memorandum upon being so filed shall as to such of the shares in the said Company as are mentioned or referred to therein, operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act, 1867, and had been duly filed with the said Registrar at or before the issue of the said shares."

The SCHEDULE above referred to.

MEMORANDUM approved by the Court and directed to be filed by order dated March 13, 1900, made In the Matter of the Dublin United Tramways Company (1896), Limited, and In the Matter of the Companies Acts, 1862 to 1898, specifying the consideration for which such of the shares in the said Company as are mentioned or referred to therein were issued.

The Dublin Tramways Company (1896), Limited, having been formed for the purposes mentioned in its memorandum, and duly registered as a limited Company on the 28th September, 1896, with the Registrar of Joint Stock Companies in Ireland under the Companies Act, 1862 to 1890 inclusive, caused to be sent to the shareholders of the Dublin United Tramways Company (being a Company formed under the statute 44 & 45 Vict. c. cxl) a circular offering to give to the said shareholders one fully paid up £10 6 per cent. preference share in the said limited Company in exchange for one fully paid up £10 share held by such shareholders in the Company formed under the said statute upon such shareholders signing and returning to the said limited Company the following agreement.

To secure the exchange of shares, this form must be filled up and returned at once.

November, 1896.

TO THE DIRECTORS OF THE DUBLIN UNITED TRAMWAYS COMPANY (1896) LIMITED.

GENTLEMEN,—In reply to the communication of the Secretary and Manager of the Dublin United Tramways Company dated 28th September inst., I beg to say that I agree to exchange my fully paid up shares of £10 each in the Dublin United Tramways Company for a similar number of fully paid up six per cent. preference shares of £10 each in the Dublin United Tramways Company (1896) Limited, and I request you to allot to me such six per cent. preference shares accordingly, and I further agree to transfer my said shares of the Dublin United Tramways Company (the certificate of which I enclose) to your Company, or as it may direct, and I also agree to accept the said preference shares, and I authorise you to register me as the holder of the same.

I am, sir,

Your obedient servant,

Name,

Address,

Shareholder in the Dublin United Tramways Company.

Note.—You are registered proprietor of the number of shares above mentioned in the Dublin United Tramways Company, and you will be entitled to receive in exchange therefor the same number of six per cent. preference shares in the Dublin United Tramways Company (1896) Limited, on returning me this form duly signed, together with the certificate of your shares, so as to reach me at once.

Wm. Anderson,
Secretary, Dublin United Tramways Company (1896) *Ltd.*,
9, *Upper Sackville-street.*

All the then shareholders in the Company formed under the said statute, save three, signed and returned to the said limited Company the above-mentioned agreement, and thereupon the said limited Company allotted and issued to the said shareholders, who had signed the said agreement, the £10 6 per cent. preference shares in the said limited Company, the numbers of which are set out at foot hereof as fully paid up £10 6 per cent. preference shares in the said limited Company in exchange for an equal number of fully paid up £10 shares in the Company formed under the said statute held by the said shareholders respectively. No contract was at or before the issue of such shares, or any of them, filed with the Registrar of Joint Stock Companies in compliance with section 25 of the Companies Act, 1867.

The £10 6 per cent. preference shares in the said Limited Company, so issued as fully paid up, were numbered 1 to 60,000 inclusive, save and except Nos. 43,026, 12,585 to 12,589 inclusive, 43,757 to 43,760 inclusive, and 14,610, 14,611, and 43,185 (1).

Solicitors for the Company: *Casey & Clay.*

W. L.

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(1) A similar order was made on the 9th July, 1900, in *In re Robertson & Ferguson, Limited.* (M. R. *Fetherstonhaugh, Q. C.*, and *Donaldson*, Counsel.)

Appeal.
1901.
March 27.

SECRETARY OF STATE FOR WAR *v.* STUDDERT (1).

(1901. No. 44.)

Practice—Transfer of action—Action by principal against agent for fraudulent misrepresentation, accounts, and for negligence—Transfer to King's Bench Division—The King suing by Secretary of State.

An action was brought in the Chancery Division by the Secretary of State for War against S. for damages for fraudulent breach of duty in inducing the Government to make excessive payments for horses purchased by him as purchasing agent, for fraudulently misrepresenting the prices at which they were purchased, for negligent conduct in purchasing horses unfit for service, and for an account of all profits made as such agent. There were five other defendants against whom damages were claimed for conspiracy in assisting in the fraudulent acts. Two of the defendants moved to transfer the action to the King's Bench Division, and Chatterton, V.-C., granted the application:—

Held, that, without deciding the question of a prerogative right in the Crown to choose in which Court it will proceed, the action could be more conveniently tried in the Chancery Division.

Appeal by the plaintiff from an order of Chatterton, V.-C., dated the 11th March, 1901, transferring the action to the King's Bench Division.

This action arose from certain orders given by, or on behalf of, the War Department to purchase horses for the Imperial Yeomanry for the war in South Africa. By Royal Warrant dated 24th December, 1899, Queen Victoria authorised the formation of a corps of Imperial Yeomanry. By instructions of the Secretary of State for War, issued under the authority of the Army Act, it was directed that the Imperial Yeomanry should be administered by a committee of seven persons, to each of whom was assigned his own special department. Colonel Alfred G. Lucas was the officer who had general supervision, and the department of providing remounts was entrusted to Colonel St. Quintin. On the 8th January,

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(1) Before Lord Ashbourne, C., and FitzGibbon, and Walker, L.JJ.

1900, Colonel St. Quintin telegraphed from London to the defendant Charles W. Studdert who resided in the county of Clare, asking him to go and inspect horses at Waterford and Dublin on the terms of £2 a-day, and expenses. C. W. Studdert telegraphed in reply accepting the offer. On the 9th January, Colonel St. Quintin wrote a letter of instructions to Studdert, and some further letters and telegrams were written and sent, by which Studdert was authorised to purchase horses at a maximum price of £30, and of a certain standard of height and quality. It was also recommended to him to deal as much as possible, and if he could, exclusively, with two named horse-dealers, Widger of Waterford, and Meleady of Dublin. Acting upon these instructions, C. W. Studdert, and those acting with him, purchased during the months of February and March, 1900, 1001 horses, for all of which the maximum price of £30 was charged to the Government. It was averred by the plaintiff that several of these horses were purchased at prices much below the sum of £30, and that several of the horses were of an inferior class as regards quality, strength, and condition.

The action was brought as stated in the endorsement on the writ by the Secretary of State for War, and Alfred G. Lucas (suing on behalf of himself and other members of the Imperial Yeomanry Committee) against Charles W. Studdert, John A. Studdert, Thomas Studdert, Wilfred Fletcher, J. W. Gregg, and John Widger, and the plaintiffs' claim was—

Against the defendant, Charles Washington Studdert, as purchasing agent of Her Majesty's Government through the War Department of horses for the public service, for—

1. Damages for fraudulent breach of duty in inducing Her Majesty's Government, through the Imperial Yeomanry Committee of the War Department, to make excessive payments for a large number of horses purchased by him as such agent by falsely and fraudulently misrepresenting to the said Committee the names of the persons from whom and the prices for which the said horses had been purchased.

2. Damages for false and fraudulent misrepresentations that he had purchased large numbers of said horses for prices largely in excess of the sums which were paid for same.

3. Damages for negligent conduct as such agent in examining and

purchasing for the public service horses which were wholly unfit for the purposes for which, to his knowledge, they were required.

4. An account of all profits made by the said defendant in the course of his said employment as such agent and in relation to his inspection, examination, and purchase of horses for the said War Department.

The plaintiffs claimed against all the defendants and each of them,

5. Damages for that they conspired and combined together to defraud Her Majesty's Government through the said War Department by aiding and assisting in the fraudulent breach of duty and wrongful acts of the defendant, Charles W. Studdert, above mentioned, and

6. For that they conspired and combined together to procure large and excessive payments from the said War Department through the Imperial Yeomanry Committee by falsely and fraudulently representing that large numbers of horses had been purchased through the agency of the said Charles W. Studdert from persons from whom they were not purchased, and for prices largely in excess of the prices actually paid for same, and

7. Damages for that the defendants conspired and combined together to obtain from Her Majesty's Government through the said War Department large sums of money by falsely and fraudulently pretending that a large number of horses supplied to the Government had been purchased by the defendant, Charles W. Studdert, at a price of £30 for each horse, whereas in fact said horses had been purchased at much less than £30, the defendants or some of them agreeing with the defendant, Charles W. Studdert, to divide the difference between them in certain proportions, and

8. An account of all secret profits made by the defendants and each of them by reason of such corrupt and fraudulent agreement and conspiracy.

The defendants by their defences, which were delivered after the motion to transfer the action had been moved, denied the fraudulent acts with which they were charged, and also the charge of conspiracy.

It appeared that on the 7th December, 1900, a writ was issued from the Queen's Bench Division in Ireland in which Alfred George Lucas (suing on behalf of himself and the other members of the Imperial Yeomanry Committee) was plaintiff, and the defendants in the present action (save John Widger) were defendants. The cause of action was practically the same. This action had been discontinued, and the writ in the present action was issued on the 17th January, 1901. On the 11th March, 1901, the defendants Gregg and Thomas Studdert moved to transfer the action to the King's Bench Division. The Lord Chief Justice had consented to the transfer of the action, and Chatterton, V.-C., granted the application. From that order the plaintiff appealed.

Wright, *S.-G.*, and *Morphy*, in support of the appeal :—

First we contend that this is a case in which the King is plaintiff, suing by the Secretary for War: the King can choose his own Court; and when he has chosen his Court, the Vice-Chancellor cannot refuse him an audience. The King had that right before the Judicature Act was passed, and that right has not been taken away. The Crown is not mentioned in the Judicature Act, and so the prerogative rights of the Crown are not affected. *Thesaurus Regis est fundamentum belli et firmamentum pacis*, Chitty on Prerogative, 244. The King may sue in what Court he pleases; Bacon's Abr., vol. 6, 457, 472; *Burgess* v. *Wheate* (1); *Attorney-General* v. *Edmunds* (2); *Attorney-General* v. *Constable* (3); *Attorney-General to the Prince of Wales* v. *Crossman* (4).

Secondly, this action was more properly brought in the Chancery Division than in a Common Law Division, and it would be inconvenient to try this case in a Common Law Court. It is an action for fraud by an agent upon his principal, and involves the taking of an account. Our case is that Charles W. Studdert was purchasing agent for the War Department, and when a plaintiff wishes to find out how much profit was made by a breach of trust, his remedy is in Chancery; at law he could only sue for damages: *Kimber* v. *Barber* (5); *De Bussche* v. *Alt* (6). The other defendants are liable to account as well as Charles W. Studdert: *East India Company* v. *Henchman* (7); *Attorney-General* v. *Vernon* (8); *Massey* v. *Davies* (9); *Lister* v. *Stubbs* (10).

As to sending an issue to be tried by a jury the rule in Ireland, Order XXXVI., R. 3, is different from the English rule; the Irish rule is the converse of the English, because it throws on the person requiring a trial by jury the *onus* of showing the propriety of having the case tried by a jury. *Boyd* v. *Phelan* (1) was an action of trespass brought in the Chancery Division, and the Court refused to transfer. *Walsh* v. *Ryan* (2) was an action for an injunction to restrain trespass and nuisance, and the Court refused to transfer. See also *Cannot* v. *Morgan* (3).

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(1) 1 Wm. Blackstone, 123.
(2) L. R. 6 Eq. 381.
(3) 4 Ex. Div. 172.
(4) L. R. 1 Ex. 381.
(5) L. R. 8 Ch. 56.
(6) 8 Ch. D. 286.
(7) 1 Ves. Jun. 287.
(8) 1 Vern. 277
(9) 2 Ves. Jun. 317.
(10) 45 Ch. D. 1.

Bushe, K.C., and *D. M'Carthy Mahony*, for Thomas Studdert and J. W. Gregg:—

We deny that this is an action in which the Crown is plaintiff: it is an action by the Secretary for War with respect to a business transaction, and does not affect the prerogative rights of the Crown. We admit that the ancient doctrine was that the King can choose his own Court, but that doctrine existed when there were a number of Courts, each of which had its own specific jurisdiction. Section 4 of the Judicature Act provided that there should be two Courts only, the High Court of Justice and the Court of Appeal, the former of which is divided into Divisions for the more convenient despatch of business. The Court in which an action is brought has power to transfer the action to another Division, Order XLIX., R. I. The King is not being refused an audience, but the action is simply transferred to another Division of the same Court, *i.e.* of the High Court of Justice. That is a matter of discretion in the Judge of the Court of first instance, with which the Court of Appeal will not interfere: *Mangan* v. *Metropolitan Electric Supply Company* (4). It would in fact be telling a Judge to try a case, which he has decided, should be tried by another Division. *Attorney-General* v. *Constable* (5) was a Revenue case, and the Crown was entitled to have a Revenue case brought in the Exchequer Division. General Order LXVIII. under the Judicature Act excepts Revenue cases.

This is an action for fraudulent conspiracy and negligence, and is a common law action for damages. A principal can recover

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(1) 17 L. R. Ir. 538.
(2) [1895] 1 Ir. 504.
(3) 1 Ch. D. 1.
(4) [1891] 2 Ch. 551.
(5) 4 Ex. Div. 172.

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at law from an agent the amount of a bribe which the agent has received, and he may also recover damages from the agent and the person who has paid the bribe: *Mayor of Salford* v. *Lever* (1). The account could be taken before a Master of the King's Bench as well as by a Chief Clerk in the Chancery Division.

Matheson, K.C. (with him, *Jefferson*), for John Widger, in support of the respondents' case, referred to *Phosphate Sewage Company* v. *Hartmont* (2).

Vesey Fitz Gerald, for John A. Studdert.

LORD ASHBOURNE, C.:—

We have heard this case very fully discussed, but not at all at too great length, having regard to the great interest which the parties obviously take in the subject-matter, which is considerable in amount and in value. It is in respect of the purchase of 1001 horses, the aggregate of whose price is alleged to amount to over £30,000, and the action is brought by the Secretary of State for War, representing of course great public interests, alleging that he made an arrangement that the purchase was to be made for the Crown of horses, I believe, for the purposes of the service of the Imperial Yeomanry. They were to be bought at a certain price, or not exceeding a certain price, and there was to be a certain sum for remuneration and expenses; and it is said that the principal defendant and the other defendants are liable to the plaintiff, because, he alleges, in breach of the agreement made between him and the principal defendant, though the latter always charged the sum of £30, which was the maximum sum measured for him to give, still he had not always paid that sum, and that the plaintiff is, under the circumstances, entitled to damages for breach of the contract, and by reason of the general conduct of the parties who are defendants here, that he is also entitled to demand an account in reference to the principal defendant who was his agent in the matter. The case really rests upon an alleged breach of trust. The action was brought in the Vice-Chancellor's Court, and there are six defendants. Two of them, represented by Mr. Bushe, moved, and the application was apparently acquiesced in by the others, that the learned Vice-Chancellor should transfer the action from his own Court, and send it to the King's Bench Division; and the learned Judge was pleased, after discussion, to yield to the application, and he made an order to have the case transferred from his own list to be tried in the King's Bench Division. That is an order that is entirely and actively challenged by the plaintiff, the Secretary of State for War, and he insists that he is entitled, on review of all the facts, to reverse that order and have the action retained where it was originally placed, that is, in the Vice-Chancellor's Court. In the progress of the argument before us, we had a variety of topics addressed to us; and it was alleged, on behalf of the defendants, that one of these arguments, which, I think, commended itself to the historical mind of the counsel for the plaintiff, was an afterthought, and was not discussed before the Vice-Chancellor, though Mr. Morphy says that he brought it to the mind of the Court before the order passed his hands. This argument was the high ground of Prerogative, and that the Secretary of State for War here was to be regarded as having all the rights of the Sovereign and entitled to use the Prerogative of the Sovereign; and he quoted Bacon's Abridgment and the other interesting authorities of that kind, with the view of showing that the King had the right to choose his Court; he also mentioned Chitty on Prerogative, and also some other cases which he cited to advance that view. These are interesting topics. But I think there is force in what Mr. Bushe says, that although these statements found in Chitty on Prerogative and in Bacon's Abridgment are entitled to be treated with historical respect, yet in this country there is since the Judicature Act really only one Supreme Court, which is composed of the High Court of Justice and the Appeal Court, and the High Court is all one, divided into divisions for the convenience of the administration of justice and for the carrying out of the great duties imposed on the Judges. I do not deem it necessary myself further to discuss or deal with that question. I am not impressed, after listening to the argument addressed to us by Mr. Bushe, with its applicability to the present case, and I would prefer to rest my judgment on the view I take of the general features of the case as it presents itself.

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(1) [1891] 1 Q. B. 168.

(2) 5 Ch. D. 394.

I desire to say that no one holds in greater regard than I do the exercise of discretion by a Judge in a matter committed to his discretion. I think it is not a matter lightly to be interfered with by any Court of review, and I would be very slow to do it, especially in the case of a Judge of such great experience and held in such high respect as the Vice-Chancellor, unless I saw certain reasons that led me to the conclusion that I did not feel at liberty to abandon in reference to the matter. It is obvious that, in a case of this kind, one must apply one's self broadly to the question—What exists in the case to effect the removal of an action from where there was jurisdiction to try it, to another branch or division of the Court? It is conceded here that there is abundant and complete jurisdiction in the Vice-Chancellor's Court, that it has a perfect mechanism to work in every part of the inquiry, that the topics are entirely suited to his Court, the ascertainment of what would be due on an account into which the element of fraud is said to enter—these are every-day topics in the Court over which the Vice-Chancellor presides. There is nothing novel, strange, or unusual, that would enable anyone to say that this is not a case which has been fairly and reasonably placed in the Vice-Chancellor's Court, where *ex concessis* there is complete and absolute jurisdiction to try out every issue in the most complete way. Then why should the case be moved? Why is it suggested that a better trial is to be obtained in the King's Bench Division? Are we satisfied that there will be as good a trial there? Are we satisfied that there would be as complete and satisfactory a trial as in the Vice-Chancellor's Court? Of course, if it is decided by the Court that there is no case against the defendants, and that it is all imagination, there is an end to the case: but in the event of there being a decree in any Court against the defendants, what does that involve? It involves a reference as to all these very numerous transactions involving this great expenditure, an examination into a very considerable number of items, in other words it involves the taking of an account that will require to be looked at closely and intelligently and under the supervision, I should say, of the same mind for a considerable period of time. If that is so, on the assumption that the responsibility is found and ascertained by the tribunal, and that an account is needed, then contrast the tribunals, and what are the arguments that would induce one to hold that there could be a better or a more satisfactory account taken in the King's Bench Division than in the Vice-Chancellor's Court? Supposing that the matter was brought on at Nisi Prius and that by some process, possibly needing the consent of the parties, it were sent into the Master's Office, how would that be worked out? The Judge possibly gets a blank finding from the jury, to be filled up after the figure was ascertained somehow in the future; the Judge is then quit of the case and gone, and the matter would then go to some one else, presumably the Master. Supposing there were questions, difficulties, or matters where the Master's discretion was challenged and disputed from time to time, they would not be going back to the same Judge who had originally tried the liability and fixed it on the defendant. It should be by constant, or repeated, or, at any rate, occasional applications to a Judge or Judges of the King's Bench Division.

Take the Vice-Chancellor's Court. There is there a Judge of vast experience and of great knowledge. Supposing he tried the case, and, for the purposes of argument, gave a decision against the defendants, the account that he would direct and the ascertainment of the figures that would be under the supervision of his tribunal would be one in which he would still be keeping the control, and in which any appeal in reference to the matter would be directly to him—the same trained mind and the same disciplined discretion. I am unable to see myself any reason that would be satisfactory to my mind why it would be desirable to compel the party who had originally placed his action in the Vice-Chancellor's Court to leave it; and I am unable to see any advantage to be gained by sending him to another tribunal, whereas I see some inconvenience and possibly serious difficulties if the order stood. For these reasons I am of opinion that the appeal should be allowed, and, of course, with the usual costs.

FITZ GIBBON, L.J.:—

Although we do not decide this case on the prerogative point, I think it right to say that, at present, I cannot see how the question whether the Act binds the Crown or not can have any practical effect as applied to the Judicature Act. It seems to me that the alteration of procedure, and the amalgamation of Courts, and the transfer of jurisdiction, under that Act must *affect* the Crown, as well as everyone else, so far as they altered existing things. Sections 4 and 5 united a number of previously existing Courts; and section 5 created, out of the amalgamation, the Supreme Court consisting of two divisions, His Majesty's High Court and His Majesty's Court of Appeal. From the day that the Act passed, for the Sovereign as well as for all His subjects, there was but one High Court with original jurisdiction, instead of all the previous Courts, and I cannot see how the King can still have His old right to go to the Court of Chancery, because there is now no Court of Chancery to which He can go. It has been abolished by King, Lords, and Commons, and, I think, therefore, that the prerogative argument cannot prevail. So far as the Judicature Act makes provision for the more convenient and proper discharge of the business of the High Court, I am not aware of any prerogative or immunity entitling the Crown to have its business transacted more expensively, or less conveniently or appropriately, than that of an ordinary suitor.

I pass from the prerogative argument, which was not addressed to the Vice-Chancellor. On the main point I go even farther than the Lord Chancellor; for, trying to put myself into the place of a Judge hearing this case, I do not see how it could, practically speaking, be *tried out* by a jury at all. The foundation of the whole action is the establishment of an *equitable* right to the money claimed. The action for "money had and received" was an "equitable action" in the terminology of scientific pleading. So far as the action "sounds in damages,"

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its ground is abuse of fiduciary relation. Money obtained by fraud can be recovered either as money had and received, or as damages, liquidated or unliquidated, under such circumstances as are alleged here. But in both cases the fiduciary relation, and the abuse of it, and the consequences of that abuse if proved, are the essence of the whole case. The impeached transactions of Major Studdert, the principal defendant, numbered 1001; deducting those in which no other defendant is concerned, there remain 780—each the purchase of a single horse. Some may have been bought in lots, but the grounds of claim render it probable that a distinct investigation of each particular transaction will be necessary. Supposing the case to come before a jury, what questions must be left to the jury? The question whether Major Studdert stood in a fiduciary relation to the Crown or not, may turn out to be a mixed question, and it may be a general question. So far as it is a question of fact, probably it could be answered by a jury, but the ultimate and only complete answer must be for the Judge. When the fiduciary relation has been established, the further questions will arise, 1, Was it abused? 2, What have the defendants, or any and which of them, made out of the abuses proved? To answer these questions each distinct transaction must be separately proved and considered, and it may be necessary to ascertain how much each defendant made on each transaction in which he was concerned. That any amount so made is recoverable as so much money had and received, or as a liquidated amount of damages, was decided by Bruce, J., in *Cohen* v. *Kusche* (1), and by the English Court of Appeal in *Hovenden* v. *Millhoff* (2). If those decisions are law, wherever a secret commission was paid by way of bribe or "back-hand," the amount can be recovered as a liquidated sum, either as money had and received, or as damages, and both the agent who paid it, and the confederate who received it, are liable to refund it to the principal whose money it was.

If this be the law, the plaintiffs here may be entitled to prove a demand made up of 780 items, as to each of which evidence may be required of abuse of confidence, and of the amount made thereby, and of the complicity of different defendants. Evidence of overt acts may be offered to prove a conspiracy to defraud the plaintiffs.

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(1) 16 *Times* Rep. 489. (2) 16 *Times* Rep. 506.

The jury alone can give the verdict in the case; they can give but one verdict, and it must cover the whole cause of action. There are, so far as I know, but two rules providing for sending such cases away from a jury after the cause has begun. The first is Order XXXVI., Rule 6, but it applies only to matters in dispute which consists wholly or in part of account, and which cannot conveniently be tried in the ordinary way. The items of such a claim as this cannot be made matter of account until, as to each transaction, the fraud has been proved, and the amount made by it also has been proved. Therefore, that rule cannot be applied here. The only other rule is Order XXXIII., Rule 2:—

> "The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

After the case had been at trial before a jury long enough to prove one or more definite instances of a fraud alleged to have been more extensively practised, how could the Judge direct an "inquiry or account" of other fraudulent transactions? If he did, he would have to send away the jury and adjourn the case, and postpone taking the verdict, until the account and inquiry had been completed. The rule does not apply to such a case as this if the text-book (Wylie, p. 506) rightly states its effect:—

> "This rule does not authorise the sending of the whole of the questions in a cause to be tried in chambers, but only accounts and inquiries which would be directed at the trial, and only common accounts and inquiries, and where larger accounts, including these, might be required at the hearing, the common order will be refused."

The authorities cited for this proposition are all in Chancery. The only mode in which I can conceive this rule being applied where a jury was empanelled would be, when a case turned out at the trial to be very complicated in details, but where some general questions could be left to the jury, findings might be taken on them, and then, by consent, an inquiry or account might be adopted as a means of ascertaining the amount of the verdict. I have seen this done by taking the issue paper signed in blank from the jury, upon the consent of both parties that the Judge shall fill in the amount when ascertained, and shall give judgment for that amount. But this is not a case in which consent can be expected, nor is it one in which an interlocutory judgment could be given *in invitum*. For these reasons it appears to me that, inasmuch as it is the right of every defendant here to have a separate and distinct trial of the allegations made against him as regards one or more of 780 cases, practically it would be impossible to try the case out before a jury. In so concluding, I am not speaking at all in derogation of that tribunal, for there are questions in the case which I would rather see tried by a jury than by any single Judge.

Contrast the procedure in Chancery. In that Division, a reference or an adjournment to Chambers can take place at any stage; but this will leave the case still before the same tribunal, and under the direct control of the Judge himself. If desirable, certain issues may be tried by a jury, and if the fiduciary relation and its breach be proved in certain cases, or if certain general issues are found against any one or more of the defendants, there may then, perhaps, be a reference, or an inquiry at Chambers, as to how many similar cases have occurred, and as to the amounts for which each inculpated defendant is liable. On such a reference or inquiry, the Chancery procedure by way of charge and discharge may be found convenient; and I certainly think that the machinery of the Court of Chancery will be found much more appropriate to the ascertainment of justice in such a case, than that of trial by jury in the Common Law Division. As the whole claim rests on an equitable foundation—on the allegation of a breach of trust—appropriate to investigation in Chancery; and as the ascertainment of the liabilities of the several defendants can more conveniently be carried out according to the practice of Chancery, I think that the motion to transfer the case to the King's Bench ought to have been refused, and that the appeal must be allowed, with costs here and below.

Walker, L. J.:—

I concur. I do not think it necessary to express any opinion on the constitutional question, but as at present advised I think that if the order be made the King will still be suing in the Supreme Court, and only before another division; it is not a different Court but a different administration of practice in the same Court. So far as that goes, however, I need not express my views upon it definitely.

As to the other point, I concur with the other members of the Court. Here Major Studdert was the appointed agent to purchase horses for the Imperial Yeomanry on the terms of £2 a-day and expenses. He was not to get a penny more, and everything outside that that he put in his pocket the Government are entitled to get in the shape of profit made on the breach of his trust. The loss, and all the alleged misfeasance, that has taken place, are matters which arise from the fiduciary relation of principal and agent, fiduciary in the highest character in the sense that he cannot make a profit out of his position. Suppose that Charles Washington Studdert was the sole defendant, as he might be, can there be a doubt that the Court of Chancery would not only be a proper tribunal, but the only proper tribunal? But the way that he used, or misused, the agency and the fiduciary relation render it necessary to bring in five other parties as defendants, the allegation being that he used the agency with these other various persons for the purpose of making a profit, and made use, it is said, of two members of his family, and an alleged seller who was really a clerk of his own to carry out his objects, in violation of his duty. The substantial matter in the case is the breach of the fiduciary duty; and in result, when the tribunal has ascertained all the cardinal facts of fraud, including Collins being in the office of Studdert, and Fletcher and Gregg being ascertained to be nominal sellers, and the fraudulent arrangement that it is alleged was made with Widger exposed, when all these cardinal facts of fraud are ascertained, there must remain an account against the agent who holds the fiduciary relation, and against the others as parties to that fraud. Therefore, I think that the Vice-Chancellor was wrong in not retaining this case in his own Court, and that it should be retained there; and that justice will be worked out more satisfactorily and completely than if the case were tried before a jury, with the incompleteness, as pointed out by my colleagues, that would be entailed by that course.

Solicitors for the plaintiff: *S. & R. C. Walker.*
Solicitor for Charles W. Studdert: *F. G. Herin.*
Solicitor for Thomas Studdert and J. W. Gregg: *Denroche.*
Solicitor for John A. Studdert: *J. B. Molony.*
Solicitor for John Widger: *Dunford.*

R. D. M.

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1901.
Jan. 25, 26.
Feb. 6.

MORRISON *v.* M'FERRAN.

(1900. No. 668.)

Will—Construction—Document found with will—Secret trust—Beneficial gift or trust—Husband and wife—Advancement—Presumption—Rebutting evidence—Estoppel.

A testator bequeathed all his real and personal estate "for the use of my wife M., her heirs, executors, or administrators respectively upon trust that she my wife M. . . . shall thereout in the first place pay my funeral expenses and debts (if any), and in the next place my testamentary expenses and debts, and in the next place do all things I have requested of her at my decease. I appoint my wife M. to be one of my executors or executrix and administrator of this my will." Then followed a proper attestation clause. And then testator appointed C. "as one of my executors." Probate was granted to the widow M., the other executor having renounced. There was no real estate. At the date of testator's death £600 bonds (valued at £667) were standing in the names of the testator and his wife, representing stock mainly purchased by the testator out of his own money, and were stated in an affidavit made by her as executrix for purposes of probate to be part of the assets of her deceased husband, the net value of which was £991. In a document found with the will after the death of testator these £600 bonds were mentioned by testator as his property, and the document stated that it was drawn up in the presence of his wife M., she agreeing to pay the sums mentioned in it to certain named persons and the treasurers of certain charitable organizations. These gifts would have exhausted the assets. This document was signed by testator. It was signed by M. without knowing the contents thereof, though at the time she knew it had something to do with

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the disposition of testator's property. Testator at the time of signing told M. to pay four sums of money to four persons (whose names and the sums directed to be paid to each, respectively, were mentioned in the document of 1899), and she agreed to do so. These sums amounted in all to £120. No other request as to disposition of the property was made to M. The document was signed by C. as witness.

Held, 1. That under the circumstances of the case the £600 bonds belonged to the widow M. by survivorship, the presumption of advancement not having been rebutted.

2. That under the provisions of the will M. took a beneficial interest in all the personal estate of the testator, subject to the payment of debts, etc., and subject to a secret trust for the payment of the four sums she agreed to pay when so requested by testator.

By his will, dated 17th August, 1893, Robert M'Ferran provided as follows :—" I leave and bequeath all my real and personal estate of every kind and description of or to what I shall at my death be seized possessed or entitled unto for the use of my wife Margaret M'Ferran her heirs executors or administrators respectively upon trust that she my wife Margaret M'Ferran or the survivors of her or her heirs executors or administrators respectively of such survivors therein his or her assigns shall thereout in the first place pay my funeral expenses and debts if any and in the next place my testamentary expenses and debts and in the next place do all things I have requested of her at my decease. I appoint my wife Margaret M'Ferran to be one of my executors or executrix or administrator of this my will." There then followed a proper attestation clause, and after it there was this additional clause :—" I appoint John Cameron, Carrickfergus, as one of my executors."

Robert M'Ferran died on 30th March, 1900, and probate of his will was, on 16th May of the same year, granted to his widow, Margaret M'Ferran, John Cameron, the other executor named in the will, having renounced .The testator left no children surviving him. The gross value of the personal estate, as stated in the affidavit made by Mrs. M'Ferran for the purposes of probate, amounted to the sum of £1008 4*s.* 7*d.*, and the net value to the sum of £991 14*s.* 7*d.* This included £600 bonds of the Belfast Water Commissioners, standing in their books in the names of the testator and Margaret M'Ferran. A few days after the death of the testator John Cameron opened a safe which had belonged to the testator in the presence of Mrs. M'Ferran, and found therein the will and another document dated 18th December, 1899, which was signed by the testator and Mrs. M'Ferran, and was witnessed by John Cameron himself. According to the statement of John Cameron the deceased asked him to witness the signing of the document, and informed him at the time that he intended it should form part of the disposition of his estate. The document was as follows:—

"WHITEHEAD,

"18*th December*, 1899.

"Cash in Water Commissioners' hands, £600 in bonds at 3½ per cent., in the names of Robert M'Ferran and Margaret M'Ferran, say £660 (or survivor), insurance on my life, £200 with bonuses.

"This draft was drawn on 18th December, 1899, in the presence of my wife, Margaret M'Ferran, of David Gillespie, and John Cameron, my wife agreeing at my death or as soon as possible or convenient for her to have carried out, and paying the following sums mentioned in this draft, namely, to the following persons named by me:—Annie M'Ferran, widow of my late brother James, £50; Lizzie M'Ferran, daughter of Anne M'Ferran, £50; Rachel Gordon, £10."

Then there followed gifts of money to the treasurers of certain charitable organizations, a gift of £5 to John Cameron "for doing your business," and a bequest of £10 to "Eliza Davison my cousin."

Then followed the signature of the testator, Robert M'Ferran. The rest of the document was as follows:—

"WHITEHEAD,

"18*th December*, 1899.

"At my wife's death she will leave all the principal chattels or monies she may be possessed of to the nearest of my relations which she may consider the most worthy. Robert M'Ferran. Show no paper to my solicitor but my will.

"(Signed) MARGARET M'FERRAN.

"(Witness), JOHN CAMERON."

The testator left no real estate.

The plaintiff, as one of the next-of-kin, brought an action for the administration of the personal estate of the testator, and to have the trusts of his will carried into execution. It was contended on his behalf that on the true construction of the will the defendant, Mrs. M'Ferran, was not entitled beneficially to the residue of the personal estate of the deceased after payment of debts, and funeral and testamentary expenses, and that the deceased died intestate as to such residue. And in case the Court should be of opinion that a valid trust was created in favour of all, or any, of the objects mentioned in the document of 18th December, 1899, the plaintiff submitted that the deceased died intestate as to so much of his residuary personal estate as would remain after satisfying such trust.

The defendant, Mrs. M'Ferran, contended that she was beneficially entitled to the residue of the personal estate after payment of debts, and funeral and testamentary expenses, and the four sums of money mentioned in the document of 18th December, 1899, as given to Annie M'Ferran, Lizzie M'Ferran, Rachel Gordon, and Eliza Davison, which four sums of money she said her husband had asked her to pay at the time of the signing of the document, and which she admitted she agreed to do. She denied that the testator intended the document of 18th December, 1899, should form any part of the disposition of his estate, and said that when signing it she was unaware of its contents, as her husband kept it folded in such a way that the contents were concealed from her.

The defendant, Mrs. M'Ferran, stated that the £600 bonds of the Belfast Water Commissioners were included by mistake in her affidavit for probate purposes, and alleged that on her husband's death she became entitled thereto.

Other evidence given in the case is referred to in the judgment; which also explains the conclusions of fact arrived at by the Master of the Rolls.

Hume, K.C., and *M'Ilroy*, for the plaintiff.

The £600 bonds of the Belfast Water Commissioners are part of the personal estate of the testator. The defendant treated the bonds as assets; they are included in the schedule of assets. The document of December, 1899, amounts to a statement by both husband and wife that the bonds formed part of the personal estate of the husband. The bonds are set out as part of his property in this document. It is signed by Mrs. M'Ferran, and she is now disputing a fact admitted in the document she has signed. The claim to these bonds on the doctrine of advancement was put forward in the defence for the first time by the defendant.

On the construction of this will the question is whether the words create a gift upon a trust, or a gift subject to a charge. In the former case there is a resulting trust; in the latter the donee takes any surplus beneficially: *King* v. *Denison* (1); *Croome* v. *Croome* (2).

The defendant is a trustee on the face of the will, and cannot, therefore, in any case take beneficially; *Riordan* v. *Banon* (3); *Re Fleetwood* (4); *Scott* v. *Brownrigg* (5); *Johnson* v. *Ball* (6); *Briggs* v. *Penny* (7).

When it appears on the face of the will that the donee is a trustee, no subsequent writing or declaration can create a valid trust. The persons named in the document of 18th December, 1899, therefore, take nothing: Lewin on Trusts, pp. 60, 65, 66.

T. Pakenham Law, *K.C.*, and *Boyd*, for the defendant, Mrs. M'Ferran:—

The £600 bonds invested in the joint names of the husband and wife will be presumed to be an advancement, and there is no evidence to rebut this presumption of law. The document of 18th December, 1899, cannot affect the widow's claim. It does not purport to claim these bonds as the husband's property, but states they belong to husband and wife or survivor of them. Once the advancement was made no subsequent declaration or act of the husband could revoke or alter it, and the defendant, Mrs. M'Ferran, is entitled to the bonds by survivorship: *Talbot* v. *Cody* (8). The statement by this defendant that the bonds formed part of the personal estate of her husband was made under a mistake as to her rights, and cannot affect them now.

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(1) 1 V. & B. 260.

(2) 59 L. T. R. 582.

(3) Ir. Rep. 10 Eq. 469.

(4) 15 Ch. D. 594

(5) 9 L. R. Ir. 246.

(6) 5 De G. & Sm. 85.

(7) 3 De G. & Sm. 525; 3 M. & G. 546.

(8) I. R. 10 Eq. 138.

There is no estoppel. The evidence in the case supports the presumption of advancement.

The question is whether the gift is a gift *upon trust* or a gift *subject to a charge*; in other words whether the legatee takes a beneficial interest in the gift or not. This depends not solely on the question whether the words "upon" or "in trust" are used, but regard must be had to all the provisions of the will, and effect must be given to every part of it. If, on the true construction of the will, the legacy is given upon trust and the trusts fail, or are not fully declared, or do not exhaust the fund, then there is a resulting trust for the heir or next-of-kin, of so much as is not required for the purpose of the trust. But, if the legacy is, on the true construction of the will, a gift subject to a charge, or subject to certain trusts, then the legatee takes all not required to satisfy the charge: *King* v. *Denison* (1); *Wood* v. *Cox* (2); *Hughes* v. *Evans* (3); *Williams* v. *Roberts* (4); *Clarke* v. *Hilton* (5); *Irvine* v. *Sullivan* (6); *Croome* v. *Croome* (7); *George* v. *Grose* (8). It is important to consider whether the legatee is the husband or wife of the testator or a relative for whom the testator might have been expected to make provision: *Irvine* v. *Sullivan* (6); *Croome* v. *Croome* (7). Too much weight must not be given to technical legal expressions when used by an ignorant testator, when to do so would defeat the testator's general intention as appearing from the will: *Sherratt* v. *Bentley* (9).

Although this defendant is an executrix of the testator, the gift must be construed as a gift to her personally and not as executrix, the rule of law being that where there are two or more executors appointed by the will and the bequest is to one of them only, the presumption is that this one was intended to take beneficially, unless the words imposing a trust are clear: *Wood* v. *Cox* (2); as Lord St. Leonards' Act does not apply to a bequest to one of several executors: *Clarke* v. *Hilton* (5). The words "thereout" and "in the first place," "in the next place," are

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(1) 1 V. & B. 260.
(2) 2 My. & Cr. 684.
(3) 13 Simon, 496.
(4) 4 Jurist (N. S.) 18.
(5) L. R. 2 Eq. 810.
(6) L. R. 8 Eq. 673.
(7) 59 L. T. R. 582.
(8) [1900] 1 Ch. 84.
(9) 2 My. & K. 149.

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important as showing that the trust only applied to portion of the gift: *Croome* v. *Croome* (1); they show that a charge for the purposes mentioned and not a trust of the whole, was intended. The law on this question was fully discussed in *George* v. *Grose* (2), where the authorities are examined and the cases of *Croome* v. *Croome* (1) and *Williams* v. *Roberts* (3), were expressly approved.

Briggs v. *Penny* (4), relied on by the plaintiff is distinguishable, as there the legatee was first given a legacy beneficially, thus showing that the subsequent and disputed legacy was not intended to be for her benefit.

Parol evidence to show the testator's intention as to the meaning of his will is inadmissible: *Irvine* v. *Sullivan* (5); *Downing's Estate* (6). Where on the true construction of the will the legacy is given subject to charges, and the purpose for which the charges are given fails, the legatee, and not the next-of-kin, is entitled to the benefit of them: *Dawson* v. *Clarke* (7); *Tucker* v. *Kayess* (8).

The document of the 18th December, 1899 cannot be regarded or given effect to as a testamentary instrument, not being executed as a will or referred to in the will: *Singleton* v. *Tomlinson* (9). The testator cannot reserve to himself by his will a power of making a subsequent testamentary disposition by an unattested paper or by parol: *Riordan* v. *Banon* (10). Where a gift is subject to a secret trust, the trust, to be given effect to, must be communicated to the legatee before the making of the will: *Johnson* v. *Ball* (11); *Scott* v. *Brownrigg* (12); *Re Fleetwood* (13): or at latest before the death of the testator: *Moss* v. *Cooper* (14); *In re Boyes* (15). In *King's Estate* (16), Mr. Justice Monroe, after an exhaustive review of the cases, stated the principle as follows, at p. 277 :—" It is essential to the creation of a valid trust that the communication should be made to the

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(1) 59 L. T. 582.
(2) [1900] 1 Ch. 84.
(3) 4 Jur. (N. S.) 18.
(4) 3 M. & G. 546.
(5) L. R. 8 Eq. 677.
(6) 60 L. T. R. 140.
(7) 18 Ves. 247.
(8) 4 K. & J. 339.
(9) 3 App. Cas. 404.
(10) I. R. 10 Eq. 469.
(11) 5 De G. & Sm. 85.
(12) 9 L. R. Ir. 246.
(13) 15 Ch. D. 594.
(14) 1 J. & H. 352.
(15) 26 Ch. D. 531.
(16) 21 L. R. Ir. 273.

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legatee in the testator's lifetime and that the legatee should not object to its contents." In the present case the contents of the paper of the 18th December, 1899, were never communicated to the legatee, although the paper states she agreed to its contents. The only gifts the legatee was told of, or agreed to pay, were four sums to four persons which the testator asked her, before his death, to pay, and which she promised to do. These she is now willing to pay out of the assets of the deceased.

The words in the will "upon trust . . . to do all things I have requested of her at my decease" mean "to do at my decease, all things I shall *then* have requested of her," and this she is ready to perform.

[Counsel also referred to *M'Cormick* v. *Grogan* (1)].

Moriarty, for the Attorney-General, referred to *Sweeting* v. *Sweeting* (2), and *In re Boyes* (3).

Feb. 6.

The Master of the Rolls :—

This case is one in which the money in dispute is of small amount, but in which an ingenious testator has managed to cause considerable difficulty in disposing of it.

Mr. Robert M'Ferran seems to have been a captain in the coasting trade. He died in March, 1900, leaving a widow, the first named defendant in the action, and no children. He left some personal property, but no real estate. There is a controversy as to what his personal property consisted of; and another as to what he did with it. The first arises in reference to £600 bonds of the Belfast Water Commissioners (valued at £667) which stood in the joint names of himself and his wife; and it must be decided whether at his death these bonds became hers by survivorship, or whether, having been in the main purchased by him with his own money, the presumption of advancement in favour of the widow is rebutted by evidence of a contrary intention. The second question arises on the construction of the testator's will—a more difficult one though there is a less amount of money involved in it. The will is dated 17th August, 1893. Some considerable time before his death and before the will, £600 stock of the Belfast Commissioners was standing in the joint names of the husband and wife, and this was converted under Act of Parliament into bonds of the Commissioners. The only circumstance that need be mentioned further is that the first purchase of this stock was made with a sum of £90 which had belonged to the defendant Margaret M'Ferran, and which her husband got as her marriage portion. This was the commencement of a series of transactions which ended in leaving the bonds of the Belfast Water Commissioners in the two names at the time of his death. His will is a peculiar one, and probably was, as Mr. M'Ilroy suggested, taken from some printed form which the testator had before him and which he ignorantly used as a help and guide in the matter: but it was properly executed and admitted to probate. The will is as follows:—"I leave and bequeath all my real and personal estate of every kind and description of or to what I shall at my death be seized possessed or entitled unto for the use of my wife Margaret M'Ferran her heirs executors or administrators respectively upon trust that she my wife Margaret M'Ferran or the survivors of her or her heirs executors or administrators respectively of such survivors therein, his or her assigns shall there at (thereout) in the first place pay my funeral expenses and debts if any and in the next place my testamentary expenses and debts and in the next place do all things I have requested of her at my decease. I appoint my wife Margaret M'Ferran to be one of my executors or executrix, and administrator of this my will." There is then a proper attestation clause, and then he appoints John Cameron to be one of his executors.

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(1) L. R. 4 H. L. 82. (2) 3 N. R. 240. (3) 26 Ch. D. 531.

Now, the question on this will is as to whether the property comprised in this universal gift of testator's estate to his wife Margaret M'Ferran on trust was one which gave her no beneficial interest, or whether it gave her a beneficial interest in everything subject to trusts which had been declared by testator.

The will was executed in 1893. The testator lived till 1900. It appears that the gross value of the personal estate as stated in the affidavit of Mrs. M'Ferran for the purposes of probate was £1008 4*s.* 7*d.*, and the net value £991 14*s.* 7*d.* That circumstance has been rightly relied on by the plaintiff against her. This sum of £1018 4*s* 7*d*. includes the £600 bonds of the Water Commissioners. Then the statement of claim states that a few days after the death of testator, one of the executors named in the will opened a safe belonging to the deceased in the presence of Mrs. M'Ferran, and found therein the will and another document dated 18th December, 1899, signed by the testator and by Mrs. M'Ferran, and witnessed by himself, John Cameron. That document is set out. [His Lordship read the document of 18th December, 1899.]

Undoubtedly, this document was signed by Mrs. M'Ferran, and witnessed by John Cameron; and Mrs. M'Ferran is now disputing that which appears on the face of the paper bearing her signature. But she says—and I am bound to say I see no ground for distrusting her statement—that when she signed the document she had not seen its contents, and that she did not read it as it was folded by her husband in such a way that only one portion of it was visible at the time. I always listen with great suspicion to a witness who says that he did not know the contents of a document he has signed. In this case I have no doubt that Mrs. M'Ferran knew that this document which she had signed had something to do with the property of her husband. But Cameron has not joined with her in taking out probate, and has (I do not say unjustifiably) taken up a position hostile to her in the case, and, consequently, cannot be treated as her witness or as acting in collusion with her; and he has corroborated her statement in a remarkable way. His name, too, appears on the document, and he states that when it was shown to him by the testator it was presented in the identical way in which she has described it as being presented to her. He says that the testator produced the paper and folded it up so as to conceal the contents from him. He gave evidence for the plaintiff. She gave an exactly similar account of how the paper was folded up so that the contents could not be seen. I am satisfied from my own observation that she is extremely deaf and could not have heard what Cameron said in Court about the matter, though no doubt she may have seen how he handled the document. She says that her husband afterwards told her that he had intended to leave money to missions, but that he had changed his mind, and said that he was not able to do it; that he did say that what he wanted to bind her to do was to pay four sums of money, which have been called legacies, to four specified persons, and which amounted in all to £120.

Did, then, these bonds of the Water Commissioners form part of testator's assets? I cannot say that the document of 18th December, 1899, amounts to anything else than a statement by testator that he intended to have it supposed that the £667 formed part of his assets. As to any statement by him that it did form part of his assets, I attach no value to it; but in the inventory of his assets these bonds are included. She stated in her affidavit that they were part of his personal estate, and that is a formidable case for her to meet. It has, however, been shown that she did this under a mistake, and I believe she knew nothing as to how her rights stood in reference to this £667. Evidence as to the circumstances under which the affidavit was drawn was properly objected to; but the transaction was eventually brought out on cross-examination; and the circumstances under which it took place have been clearly proved. She and Cameron went to the solicitor, Mr. Stewart. She objected to these bonds being put in the schedule. Stewart told her it would not matter, as all went to her. That was his view of the law. At any rate the bonds were put in the schedule of assets by his direction and against her wish. In the proceedings commenced in the Vice-Chancellor's Court by originating summons, no doubt, Mrs. M'Ferran in her affidavit did not deny that the assets included these bonds. But though this fact may be evidence against her, there is no estoppel, and the question really is as to the transaction itself.

As to advancement, parol evidence to rebut the presumption is admissible. But, in this case, except the conduct of the defendant Mrs. M'Ferran herself, the plaintiff has not produced any evidence to rebut the presumption. It is settled that the declaration of the man who is presumed to have made the advancement, to rebut that presumption, is not admissible, if made *after* the time the transaction takes place. And if there was a real advancement under the circumstances of this case, no statement by testator in the confused papers before me is sufficient to alter the effect of the original transaction. On the contrary, the papers show that testator knew and intended the purchase of stock in the joint names to be an advancement in

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favour of his wife, if she survived him. And this is clear also from the evidence of Mr. Reilly, who was a friend of the testator. He says that testator told him that the stock was to be for the wife if she survived him. There is no evidence to rebut the presumption of advancement. The evidence is strongly in favour of it; and in the case of a husband and wife, where the money is in their joint names, the law presumes an advancement. No doubt the husband having here made an advancement may have changed his mind, but that cannot alter the right of the wife. Therefore, the bonds of the Water Commissioners must be treated as the subject of an advancement in favour of the wife, if she survived, and not as assets of the deceased, and must belong to Mrs. M'Ferran by survivorship.

There still remains the question as to the effect of the will. The net assets amount to £991: the bonds are valued at £667: the residue is £324; and that (subject to payment of costs) would, in the event of Mrs. M'Ferran being declared to be a trustee and having no beneficial interest, after payment of debts, etc., go as undisposed assets to the next-of-kin under the statute, of whom the plaintiff is one. The success of plaintiff's case depends on the fact that Margaret M'Ferran is merely a trustee, because if she is not merely a trustee, if she has any beneficial interest, there is nothing distributable among the next-of-kin. She admits she is bound to pay four specified sums or legacies to specific persons: *Moss* v. *Cooper* (1), decides clearly that if her husband told Mrs. M'Ferran to pay these four sums of money, and she agreed to do so, she is bound by a trust. Then, on the face of the will, does she take a beneficial interest? If I am right in holding that there was an advancement in favour of the wife as regards the £600 bonds, she would not take these under the will. But there still remains the question as to £324, which, if Margaret M'Ferran were only a trustee, would go as assets, to one-half of which she would be entitled, and the remainder would go to the next-of-kin. The testator leaves all "for the use of my wife Margaret M'Ferran," a circumstance tending to show that he is dealing with her not merely as executrix. He supposed he was giving the use of everything to his wife, and not to anybody else. The second executor is not named until after the attestation clause, though he intended all through to have two. The property is given to her alone upon trust, out of it in the first place to pay funeral and testamentary expenses and debts, and in the next place to "do all things I have requested of her at my decease." I am satisfied, on the evidence, that at the time of the making of the will he had not requested her to do anything. If it means that she is to apply the entire residue "in the way I have requested her to do," and he had made no such request, the trust for that purpose wholly failed; but still she would be a mere trustee. But if it means to do all things "which I shall have requested her to do before my decease" that would be satisfied by what actually took place; that is by what she says he asked her to do. The law on the subject has been gone into at great length, though some of the cases cited have not much bearing on the present. The statement of Theobald on Wills, p. 432, applies to this case. He says:—"And if the proper construction of the will is that there is a trust, evidence is not admissible to show that the trustee was intended to take beneficially. But the question is one of construction upon the whole will, and where the donee in trust is a wife or relative whom the testator may be supposed to have intended to provide for, and there are other circumstances to assist the construction, the proper conclusion may be that the donee is to take subject only to the partial trusts declared."

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(1) 1 J. & H. 352.

There is one case which resembles the present very nearly. In *Williams* v. *Roberts* (1), a testator gave all his residuary estate to his wife "upon trust" to pay an annuity, and "upon further trust" to pay certain legacies which did not exhaust the whole estate. Stuart, V.-C., says: "The question is whether the testator has, by his will, made his widow a trustee of the whole, or of part only, of his personal estate. The language of the will cannot, I think, be construed in any other way than as making her a trustee of that portion of the property only which is given to the legatees other than herself. The statute 1 Wm. 4, c. 40, does not, I think, apply to this case in any way." One could hardly expect to find any case nearer to the present than that is.

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(1) 27 L. J. Ch. 177.

I do not know of any case deciding that an equity of this kind between husband and wife depends on the consideration as to whether or not there is any provision for the wife outside that disposed of by the will; but on the face of this will itself it seems to me absurd to suppose that testator intended to devote all his property to such purposes as he should declare, and that no provision was intended for his wife; or that he intended to die intestate, as to the residue remaining after satisfying the trusts he had declared. The distinction between two classes of cases is illustrated by *Mullen* v. *Bowman* (1), where the relationship of husband and wife did not exist, and the only circumstance, outside the terms of the will, to be considered was, that the testator left property to two persons who were his executors. There the Vice-Chancellor held the executors took no beneficial interest, and there was nothing but a trust.

On the whole, I am of opinion that the testator gave a beneficial interest in all his property to his wife, subject to the payment of debts, &c., and of the four sums she assented to pay, and that she takes a beneficial interest in all his estate untrammelled by anything except the secret trust as regards these four legacies.

Solicitor for plaintiff: *Blackburne.*
Solicitor for defendant Mrs. M'Ferran: *Stewart.*
Solicitor for Attorney-General: *Warren.*

R. W. L.

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(1) 1 Coll. 197.

M. R.
1901.
March 4.

CURTIS *v.* CURTIS.

Originating summons—Jurisdiction—Advancement—Infant—Assets in the hands of administrator—Course of administration—Question affecting next-of-kin—Rules of 1891, *Order LV., Rule* 4, *sub-sects.* (*a*) (*g*).

The plaintiff as *administrator de bonis non* of the estate of the father of an infant had in his hands as assets a sum of £2013, to one-third share of which the infant was entitled. The plaintiff issued an originating summons under Order LV., Rule 4, asking for a declaration that he was at liberty to advance £315 out of the infant's share in order to pay an apprenticeship fee for him to a chartered accountant in order to enable him to learn that business:—

Held, that the Court had power to sanction the proposed advancement, and would do so under the circumstances of the case.

ORIGINATING SUMMONS.

Thomas Henry Curtis, of Rathgar, Dublin, died in November, 1895, a widower and intestate, leaving three infant children his sole next-of-kin surviving. Letters of administration of the personal estate of the deceased were granted to his father, Thomas Curtis, in 1896; and, he having died without having fully administered, administration *de bonis non* was granted in May, 1900, to the plaintiff, who was the uncle of the infant defendant. Bertram Curtis, the infant defendant, the eldest of the three children of Thomas Henry Curtis, was born in 1883, and the plaintiff, as administrator *de bonis non* of the estate of Thomas Henry Curtis, had in his hands a sum of £2013, to one-third share of which the infant defendant was entitled. In addition to his share in these assets of his father, the infant defendant was entitled under the will of his grandfather to shares in Guinness and Company of the market value of £378, and also, subject to the life estate of his grandmother, to a capital sum of £1264. The infant defendant was living with his grandmother in London, and was a probationer in the office of Mr. Van de Linde, a chartered accountant in that city, prior to becoming an articled clerk in the business, and he was desirous to have a sum of £315 paid as an apprenticeship fee to Mr. Van de Linde, in order that he might be taught the business and become qualified to practice as a chartered accountant, which course was approved of by the plaintiff, as being for the benefit of the infant defendant.

The plaintiff issued an originating summons asking the Judge to sanction the proposed advancement out of capital.

In support of the application there were affidavits sworn by the plaintiff and by the infant defendant showing the desirability of the proposed advancement, the respectability and eminence of Mr. Van de Linde, who had his offices in one of the centres of business activity in the city of London; the desire and aptitude of the infant defendant for the business, and the custom as regards fees payable by apprentices to chartered accountants.

R. W. Lucas in support of the application:—

A proper case is made for the proposed advancement.

[The Master of the Rolls:—I think it is shown that the advancement would be for the benefit of the minor. But how have I the power to make the order asked for?]

There is power under Order LV., Rule 4. Under clause (*a*), as being a question affecting the rights or interest of a person claiming to be next-of-kin or *cestui que trust*; and under clause (*g*) as being the determination of a question "arising in the administration of the estate or trust." Section 3 of Lord St. Leonards' Act (22 & 23 Vict., c. 35) provides for the exercise of a similar jurisdiction by the Court previous to the Judicature Act: *Re Larken's Estate* (1) is reported only on a point of practice, but shows that a petition by trustees for liberty to advance out of capital was a proper application under that Act: and the administrator of assets is in the same position as the trustees of a will. The English authorities show that any point formerly determinable in an administration suit properly constituted can now be decided under Order LV., Rule 4, on originating summons.

[The Master of the Rolls:—I think that is so. But how does any question arise? The minor is entitled to his share. How have I jurisdiction?]

In *Conway* v. *Fenton* (2) it was held the Court had jurisdiction

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(1) [1872] W. N. p. 85.

(2) 40 Ch. D. 512.

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to sanction the use of capital for certain necessary repairs on the application of trustees coming by summary mode to obtain the determination of the question. This case was followed in *Hurst* v. *Hurst* (1), decided in this Court. Both these cases are cases of wills. But both in *Conway* v. *Fenton* (2) and *Hurst* v. *Hurst* (1) the questions presented for determination arose *outside* the trusts of the respective wills. The same rule applies to questions as to assets in hands of an administrator, and to trust property in hands of trustees, under Order LV., Rule 4.

THE MASTER OF THE ROLLS:—

I will look into the matter and will make the order if I am satisfied I have the power to do so.

The following memorandum was subsequently given to his Registrar by the Master of the Rolls:—"I think this proposed advancement is for the benefit of the minor: and am of opinion that I have power to sanction it under the general jurisdiction of the Court. See *Lee* v. *Brown* (3); Williams on Executors (last ed.) pp. 1274, 5. Be it so."

The following order was made:—

> "The Judge being of opinion that the same will be for the benefit of the infant, it is ordered that the applicant, as *administrator de bonis non* of the personal estate of Thomas Henry Curtis, deceased, be at liberty to pay by way of advancement out of the moneys in his hands to which the said infant defendant Bertram E. Curtis is entitled as one of the next-of-kin of Thomas Henry Curtis a sum of £315 as and for an apprenticeship fee for the said infant defendant to Mr. Gerard Van de Linde, of 50 Gracechurch-street, London, E.C., for the purpose of enabling the said infant defendant to learn and qualify for the practice of the business or profession of chartered accountant; and the Judge doth declare applicant entitled to the costs of this application when taxed and ascertained, said costs to be paid out of the said moneys in his hands to which the said infant is entitled."

Solicitors for the applicant: *Middleton & Son.*

R. W. L.

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(1) 29 L. R. Ir. 219. (2) 40 Ch. D. 512. (3) 4 Ves. 362.

In THE MATTER of THE ESTATE of RICHARD FISCHER, a Vendor of Land.

Meredith, J.
1900.
April 23;
June 16.

Landlord and tenant—Land Purchase Acts—Superior interest—Reversion of the Crown.

The reversion of the Crown in a vendor's estate, held under patent for the lives of the grantee from the Crown and his heirs male, is not within section 31 of the Land Law (Ireland) Act, 1896; and the redemption of it can only be carried out under section 68 of the Landed Estates Court Act, with the consent of the Crown.

Hearing of the final schedule of incumbrances.

This was an application on behalf of the vendor, upon the hearing of the final schedule of incumbrances, for an order that it be declared that the reversion of the Crown in the lands of Listerlin, in the barony of Listerlin, and county of Kilkenny, upon the failure of the heirs male of the body of Peter Butler, Earl of Ossory and Ormond, was a superior interest within the meaning of sect. 31 of the Land Law (Ireland) Act, 1896, and for an order that it be declared of no value, and that the purchase-money of the said lands be distributed without regard to same, or, in the alternative, that the price may be fixed by arbitration, or otherwise, under the said 31st sect.

The reversion in the Crown referred to arose under the following circumstances:—By Letters Patent, dated the 23rd of October in the 29th year of the reign of King Henry 8, the King granted to Peter Butler, Earl of Ossory and Ormond, and James Lord Butler, his eldest son, certain lands, &c., situate in the county of Kilkenny, and other counties, to hold to the said Peter and James for the term of their lives and the life of the survivor of them and to the heirs male of the body of the said Peter, lawfully begotten for ever. By certain private Acts of Parliament, namely 7 & 8 William 3, 9 William 3, and 13 William 3, the Dukes of Ormond, who were the lineal descendants of Peter Butler, Earl of Ossory and Ormond, were empowered to make leases for lives renewable

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for ever, and fee-farm grants of portions of the estates comprised in the grant from the Crown, the leases to be made in pursuance thereto to be declared to be binding on all persons claiming through the Duke of Ormond and the Earl of Arran; it was, however, declared that there was saved and reserved "to his Majesty, his heirs and successors, all his and their right, title, and interest of, into, and out of all or any of the manors, lordships, towns, houses, lands, tenements, and hereditaments." In exercise of the powers thereby conferred on him James, Duke of Ormond, conveyed the lands of Listerlin, in the barony of Ida and county of Kilkenny to John Eaton by fee-farm grant dated the 4th of October, 1711. The lessee's interest thereunder became vested in the vendor; and for the purpose of carrying out the sales to his tenants under the Land Purchase Acts it became necessary to deal with the reversion in the Crown. The other facts appear fully in the judgment.

Chaytor, for the vendor, in support of the motion:—

This reversion is within section 31 (8) of the Land Law (Ireland) Act, 1896. 1. This is a reversion not in the land, but in the fee-farm rent. 2. "Such reversion or estate" in the end of the section embraces the words in the earlier part of the section, "any estates . . . contained in any fee-farm grant."

[The following cases were cited:—*Re Estate of the Marquis of Ormonde* (1); *Re Murphy's Estate* (2); *Re Maunsell's Estate* (3).]

Walker, for the Commissioners of Woods and Forests:—

This reversion can only be acquired with the consent of the Commissioners of Woods and Forests, under sect. 68 of the Landed Estates Court Act.

[*Re Costello* (4) was cited.]

June 16.

MEREDITH, J.:—

In this case I am asked to decide that the reversion of the Crown upon the failure of the heirs male of the body of Peter

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(1) 28 Ir. L. T. R. 73.

(2) 34 Ir. L. T. R. 42.

(3) MacCarthy's Land Cases, 103.

(4) 33 Ir. L. T. R. 73.

Butler, Earl of Ossory and Ormond, is a "superior interest" within the meaning of section 31 of the Land Law (Ireland) Act, 1896, and further to declare that such superior interest is of no appreciable value to the Crown, and consequently that the purchase-money of the lands sold to the tenants may be distributed without regard to such superior interest; or in the alternative that the price or compensation to be paid in respect of such superior interest be determined by arbitration or otherwise under the said section.

The facts appear from the affidavit of Mr. Charles A. Stanuell. He states that the estate before the Court has been sold to the tenants for the sum of £4544. The estate consists of the lands of Listerlin, in the barony of Ida and county of Kilkenny, held by the vendor under fee-farm grant dated the 4th of October, 1711, from James, Duke of Ormond, to John Eaton. In the certificate furnished by the Quit Rent Office to the Irish Land Commission it is stated that the lands are not charged with any quit-rent, but that they form part of the Manor of Rosbercon, which was granted by Letters Patent dated the 23rd of October, 29 Henry 8, to Peter Butler, Earl of Ossory and Ormond, and James Butler, Lord Butler, to hold for the lives of the said Peter Butler and James Butler and the longer liver of them and the heirs male of the body of the said Peter Butler lawfully begotten. Mr. Stanuell then states that having been advised that it was necessary to redeem the reversion of the Crown, his firm entered into correspondence with the Receiver of Quit and Crown Rents as to the price (if any) to be paid for such redemption, and he states his reasons for believing that the reversion of the Crown is (in existing circumstances) absolutely worthless.

Now I may say in passing that I am satisfied, from the statement made to me by the representatives of the Crown, that the price of £55 demanded on behalf of the Crown is not an artificial or fancy price ascertained at the pleasure of the particular officer in charge of the Crown Rent Office, but that it is fixed upon a scale laid down in a valuation obtained by the Treasury for the guidance of the department having charge of the interest of the Crown in these matters.

In the schedule of incumbrances now before me the Commissioners of Woods and Forests are placed first on the schedule. The following note, however, appears in the observation column:—"Such sum, if any, as may be fixed by the Court in respect of the reversion of the Crown expectant under Letters Patent dated 23rd October, 29 Henry 8, to Peter Butler, Earl of Ossory and Ormond, and James Butler, Lord Butler, for the lives of the said Peter Butler and James Butler and the longer liver of them and to the heirs male of the said Peter lawfully begotten for ever."

Obviously the schedule was framed thus to allow the parties the opportunity of arguing the question whether the reversion in the present case is a reversion which can be dealt with under sect. 31 of the Act of 1896. After the most careful consideration, I have arrived at the conclusion that I cannot deal with it under that section. I am not at liberty to speculate as to what may have been the intention of the Legislature. I am not at liberty to guess at what may have been in the minds of the framers of the section. I can only deal with the expressed intention to be ascertained by reference to the language of the section.

In the first clause of sub-section 8 of section 31 I find these words, "The expression 'superior interest' shall include any rent, rentcharge, annuity, fees, duties, or services, payable or to be rendered in respect of the land sold to any person, including Her Majesty and Her successors." I am unable to adopt the view suggested by Mr. Chaytor, that the reversion in the present case might be held to be a reversion not in the lands but in the fee-farm rent, and therefore within the above definition; the section proceeds:—"And any estates, exceptions, reservations, covenants, conditions, or agreements contained in any fee-farm grant, or other conveyance in fee, or lease, under which such land is held, and if such land is held under a lease for lives or years renewable for ever, or for a term of years of which not less than sixty are unexpired at the date of the sale, shall include any reversion or estate expectant on the determination of such lease or expiration of such term, and notwithstanding that such reversion or estate may be vested in Her Majesty and Her successors." Mr. Chaytor contends that the words "such reversion or estate" may be read as embracing by reference the earlier words of the section, "and any estates . . . . contained in any fee-farm grant or other conveyance in fee, or lease," but in this respect I am unable to follow his argument. I am of opinion that the words "such reversion or estate" in the concluding clause of the sub-section must be read as referring solely to the class of reversion or estate mentioned immediately previously; that is to say, any reversion or estate expectant on the determination of a lease or expiration of a term, and to no other reversion or estate. The reversion in the present case is therefore not a "reversion or estate" within the meaning of the concluding words of the section. Now, there is no proposition of law better settled than that the rights of the Crown are not affected by an Act of Parliament unless the Crown is expressly named, or referred to by necessary implication. In the present case the Crown is named and the rights of the Crown are affected, but to what extent? *Expressio unius est exclusio alterius*, and when I find a special and limited class of reversions dealt with by the Statute, and an express declaration that as to *such reversions* Her Majesty and her successors shall be bound, what authority or jurisdiction have I to extend or enlarge the class? None, whatever. I may, however, express my regret that I have no power to deal under the 31st section with this particular reversion in the Crown, for indeed there does not appear to be any adequate reason for drawing a distinction between such a reversion as the present and a reversion expectant on the determination of a lease for lives renewable for ever. But as the 31st section does not apply, I can only act in the matter with the consent of the Crown according to the ordinary practice of the Court. Sect. 68 of the Landed Estates Court Act provides, *inter alĩa*, "and it shall be lawful for the Court, where it shall think fit, to purchase, with the consent of the said Commissioners of Woods, any estate or interest of the Crown, in remainder or reversion, in the whole or any part of the lands, &c." The whole course of the proceedings here is based on the agreement made by the vendor to sell to his tenants discharged from the reversion in the Crown; and although the Vesting Orders were executed before this question was determined, the rights of the Crown are not altered or affected thereby. The claim of the Crown in respect of this reversion was placed, and in my opinion properly placed, first on the schedule of incumbrances. No objection was taken by Mr. Chaytor to the position of the Crown on the schedule; he recognised that the reversion

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should and must be dealt with; the question was could it be dealt with under the far-reaching provisions of sect. 31 of the Land Act of 1896, or must it be dealt with under the provisions of sect. 68 of the Landed Estates Court Act, which makes the consent of the Crown an essential part of the jurisdiction to redeem. I hold that it must be dealt with under the latter section, and, so holding, I have no means of compelling the Crown to sell for less than they demand, or to go to arbitration as to the price to be paid for redemption, or to recognise that the interest for which they ask £55 is (if Mr. Stanuell is correct) of the merest nominal value. It is a matter entirely for the Crown; I cannot argue as to the justice or fairness of the claim. I express no opinion whether it is just or unjust, fair or unfair. The purchase cannot be carried out by the Court without a consent, not merely to redeem, but a consent as to the redemption price. As I mentioned before, the Crown (I am informed) have a settled scale which is not ascertained at the pleasure of the particular officer of the day. In fact I have in a number of cases (without question raised) paid, out of the purchase-moneys of lands sold in this Court, the sums asked for by the Crown as the price for redemption of Crown reversions. I have no option but to follow the same course in this case, and I accordingly rule that the Commissioners of Woods and Forests shall be returned on the schedule as claimants at No. 1, entitled to be paid £55 in respect of their claim. I wish to make it absolutely clear that I hold that I have no power under the frame of the schedule, or otherwise, to alter the amount of the claim. I fix it then at £55, being the amount at which the Commissioners of Woods and Forests consent that their reversion shall be purchased by me, pursuant to the 68th section of the Landed Estates Court Act.

Solicitors for the Vendor: *Stanuell & Son.*

Solicitors for the Commissioners of Woods and Forests: *Hallowes & Hamilton.*

W. C. S.

TOOLE *v.* HAMILTON.

(1901. No. 346.)

M. R.
1901.
May 7, 8.

Will—Construction—Ademption—Receipt of residuary estate by testatrix—Payment into bank—Exercise of control over fund—Part ademption—Charity—Perpetuity—Repair of enclosure round a grave—Void gift.

By a codicil to her will testatrix devised and bequeathed "all monies and property devolving upon or receivable by me under the will of W." to A and B upon trust to pay certain legacies. During her lifetime testatrix received a sum of £693 in respect of the residuary estate of W., and thereupon opened an account with a bank and lodged the money to her own credit. She from time to time drew out sums of money for the payment of the testamentary expenses of W., for making gifts to persons (some of whom were beneficiaries under the trust in her codicil), and for other purposes of her own. Previous to this lodgment of £693 testatrix had no banking account. After the payments to her there remained as balance to her credit a sum of £149. Subsequently a further sum of £151 was received by testatrix in respect of the residuary estate of W., and this was lodged by her in bank, making in all the sum of £300, which remained intact to the credit of her account at the date of her death:—

Held, that the bequest to A and B was adeemed only as regards money paid out of bank to testatrix, but that as regards the sum of £300 remaining intact at her death to the credit of her account there was no ademption, and that the same passed under the bequest in her codicil.

Bequest of £50 to be invested and the dividends to be applied in keeping the enclosure round a grave in order and repair *held* to be void.

By her will, dated 10th September, 1890, Margaret Lyster after certain devises and bequests provided as follows:—"I will and bequeath to the Incumbent and Churchwardens for the time being of the parish of Boyle £50, to be by them invested in Government or other solvent security, and the interest or dividends thereon to be applied by them to keeping in nice order and repair the enclosure round the graves of the late Rev. Stephen Lyster and his family in the graveyard adjoining the parish church of Boyle." She appointed the plaintiff and the defendant Hamilton her executors and made the plaintiff her residuary legatee.

By codicil to her will, dated 10th August, 1896, testatrix after reciting that she had recently become entitled to certain monies and property under the will of Mrs. Margaret Wilson, deceased, gave, devised and bequeathed "all such monies and property so devolving upon or receivable by me under the said will to William Laurence and the Rev. Francis E. Clarke, upon trust that they shall receive the same or such part thereof as shall not have been received by me in my lifetime and shall convert into money such part thereof as shall not consist of money, and after payment thereout of all expenses in connexion with the receipt or recovery thereof . . . . upon trust out of such part as shall consist of pure personalty," to pay certain legacies, and to pay the residue of the money in equal shares to three persons of whom the defendant Hamilton was one.

Testatrix died on 15th November, 1900, and probate of her will and codicil was, on 19th December, granted to the plaintiff and the defendant Hamilton as executors thereof.

Testatrix under the will of Mrs. Margaret Wilson (who died 10th November, 1895), became entitled to residuary estate, portion of which amounting to the sum of £693, she received in October, 1897. Testatrix had not previously any account with a bank; but on receipt of this sum of £693, she opened a banking account with the Boyle Branch of the Bank of Ireland, and lodged the same in her own name. From time to time testatrix drew on the account by cheques and received payments on foot thereof, which monies were used by her partly for testamentary expenses in connexion with Mrs. Wilson's estate, partly for gifts of money to persons, some of whom were named as beneficiaries under the trust in the codicil to her will, and partly for other purposes of her own. After these payments were made by her, there remained a balance to the credit of her account of £149. In October, 1900, testatrix received a further sum of £151 in respect of the residuary estate of Mrs. Wilson, which was paid into bank by her, and at the date of the death of testatrix this sum of £300 remained untouched to the credit of her account.

The plaintiff issued an originating summons for the determination of the questions arising on the construction of the will and codicil.

Stubbs, for the plaintiff, the residuary legatee of the will:—

1. Under the terms of the codicil this was only a gift of whatever the testatrix had not received during her lifetime, as the clause in the trust as to it being limited to whatever was received during her lifetime must be read into the gift in the preceding words.

2. This legacy is adeemed by reason of it having been placed to the banking account of the testatrix, and drawn on by her, partly in favour of the legatees, but to the greater part in favour of strangers, including several cheques drawn in her own favour. The fact that the second portion of the legacy was only received a short time before her death, and that no cheques were drawn after it was received does not affect the case, for it was mixed with the sum already there, which had been treated by her as her own. In *Fryer* v. *Morris* (1), Sir William Grant, M. R., says:—"She drew out a part of that money. That is treating it as her own. If she meant to appropriate it, and consider it as a legacy still standing and binding upon her estate, she ought not to have touched it." In *Stanley* v. *Potter* (2), which was a bequest of a bond debt paid off during the testator's lifetime, the Lord Chancellor laid down that where a testator gives by his will a particular sum of money, and he afterwards receives and spends it, there would be an ademption. So in *Harrison* v. *Jackson* (3), where stock was bequeathed, and paid off in testator's lifetime, and re-invested in other names and other securities, it was held to be adeemed. In *Lee* v. *Lee* (4), where there was a gift of a sum of stock, testator's share in A. B.'s property, which was sold out, mixed with testator's property, and spent, it was held to be adeemed. Vice-Chancellor Kindersley says: "it appears that the testator sold the £1100, received the money, mixed it with his own, and for aught that appears he might have spent it, at all events dealt with it as part of his cash, and it could be no further traced," and further on he says it was "sold and destroyed." To the same effect is *Manton* v. *Tabois* (5),

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(1) 9 Ves. 360.

(2) 2 Cox. Ch. Cas. 180.

(3) 7 Ch. D. 339.

(4) 27 L. J. Ch. (N. S.) 824.

(5) 30 Ch. D. 92.

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TOOLE
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(see observations of Bacon, V.-C., at page 100). In *M'Clellan* v. *Clark* (1), Pearson, J., gives a hypothetical case (at page 617), exactly similar to the present.

Even a clear intention that there should be no ademption will not prevent the operation of the doctrine. *Re Bridle* (2), followed in *Slade* v. *Walpole* (3). Even if intention is evidence the testatrix must be held to have contemplated the effect of the difficulties which would arise in the administration of this fund between those who were paid on account of their legacies, and those who received nothing, and should not be held to have contemplated or intended leaving such a complicated matter to be dealt with by the trustees.

3. As to the bequest for keeping the grave in order, this is clearly void as creating a perpetuity: *Fowler* v. *Fowler* (4); *Hoare* v. *Osborne* (5); *Vaughan* v. *Thomas* (6).

Law, K.C., for the defendant, the Rev. Francis Clarke:—

This is a gift of a specific legacy, and so far as a specific legacy has vanished no recoupment can be claimed. But words may be used showing intention to give a particular fund or what represents it from time to time: *Dowsett* v. *Meakin* (7). Here the gift in the codicil is of the whole of the money, whether received or not, and the words used are sufficient to cover it wherever found. Both in *Lee* v. *Lee* (8) and *Morgan* v. *Thomas* (9), there was only partial ademption, and the fact that a part of the gift is exhausted in this case does not show that the whole is adeemed.

The principle of ademption depends primarily upon a question of construction, and if the words of a will are sufficient to carry the property under whatever form it is found existing at the death of a testator it is sufficient; it is otherwise if the thing, the subject of the gift, is destroyed: *In re Johnstone's Settlement* (10);

(1) 50 L. T. R. 616.
(2) 4 C. P. D. 336.
(3) 61 L. T. R. 497.
(4) 33 Beav. 616.
(5) L. R. 1 Eq. 585.
(6) 33 Ch. D. 187.
(7) [1901] 1 Ch. 398.
(8) 27 L. J. Ch. (N. S.) 824.
(9) 6 Ch. D. 176.
(10) 14 Ch. D. 162.

Re Kenyon's Estate (1); *Willet* v. *Finlay* (2); *Vickers* v. *Mellor* (3). In *Fryer* v. *Morris* (4); in *Re Bridle* (5); in *Stanley* v. *Potter* (6); and in *Harrison* v. *Jackson* (7) the subject-matter of the gift had been destroyed. It no longer existed, and so the principle of ademption prevailed. In *Manton* v. *Tabois* (8) there was a gift of "all my interest in the C estate," and as the testator had no interest in the C estate at his death, it was held there was ademption. In *M'Clellan* v. *Clark* (9), there was a gift of the Bombay, &c. Railway stock, and it was held that the words of the will were not sufficient to cover what had ceased to be the Bombay Railway stock.

Neither the fact of the lodgment by testatrix in this case of the money received from the residuary estate of Mrs. Wilson, nor the fact that portion of this fund was made use of by her for her own purposes can be held to adeem the £300 which represents another untouched portion of the residuary estate of Mrs. Wilson coming to the testatrix.

As to the gift for the repairs of the enclosure round the graves, this is a gift which tends to improve the access to the church, and is therefore of a charitable nature. It is, therefore, not void.

Boyd, for the defendant Hamilton:—

There is enough in this case to show that the intention was to give the fund representing the residuary estate, no matter in what shape it was found at the death. There was no ademption, having regard to the circumstances of the case: *In re Johnstone's Settlement* (10); *Dowsett* v. *Meakin* (11); *Clark* v. *Browne* (12).

Stubbs, in reply:—

In all the cases cited, the funds could be traced in their investments and were intact. In *Kenyon's Estate* (1), it was held that

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(1) 56 L. T. R. 626.

(2) 29 L. R. Ir. 156, 497.

(3) 81 L. T. R. 719.

(4) 9 Ves. 360.

(5) 4 C. P. D. 336.

(6) 2 Cox. Ch. Cas. 180.

(7) 7 Ch. D. 339.

(8) 30 Ch. D. 92.

(9) 50 L. T. R. 616.

(10) 14 Ch. D. 162.

(11) [1901] 1 Ch. 398.

(12) 2 Sm. & Giff. 524.

May 8.

the gift was in effect of the money, "in whatever, form it may be found." *Clark* v. *Browne* (1), was disapproved of in *Harrison* v. *Jackson* (2) and *Manton* v. *Tabois* (3).

THE MASTER OF THE ROLLS :—

This case has been extremely well argued, and Mr. Stubbs especially has shown great industry in the collection of cases which he has brought before me.

The first question on the will raised by the summons is as to the effect of a gift for the purpose of providing for the care of a grave; it is in the following terms (his Lordship read the clause of the will). Now the churchwardens of the parish of Boyle are not represented here, although the incumbent is, and in reference to this gift as the case is clear on the authorities what I will do is, subject to cause being shown by the churchwardens after service upon them, to make a declaration expressing my opinion that the gift fails on the ground of perpetuity. The money is not to be spent at once, applied in keeping the graveyard or enclosure round the grave in order, nor is it for putting a grave in order, in which case the money would be spent once for all; but the dividends are to be for ever applied in keeping the grave in order, and, therefore, unless it is for a charitable purpose, the gift is void for perpetuity. The grave is not part of the fabric of the church, and the only way it was suggested that the gift was not void was that the purpose was of a charitable nature, inasmuch as it would improve the access to the church, and so would be a gift dedicated to public charitable purposes. But there is nothing of the kind shown here, and so the gift is unquestionably void as creating a perpetuity not for charity.

The other question is a more difficult one. It appears that this testatrix was a lady of considerable sense and intelligence, and quite free to dispose of her property as she chose. The question arises on the terms of the second codicil (his Lordship referred to the codicil). Now, Mr. Stubbs argued that the gift of the interest in the residue of Mrs. Wilson's estate, and the trust, were to be read together, and that the former was cut down by the latter, and, consequently, as the entire of the residuary estate had been received by the testatrix in her lifetime there was nothing upon which the gift could operate. That, in my opinion, is not the true construction. There is a gift of the entire residuary estate to which she was entitled, and then there is a direction to the trustees to realize any outstanding portion not received by her, and to pay it in accordance with the trusts declared later on. They were meant to stand in her shoes as to the whole property. The outstanding residuary estate of Mrs. Wilson amounted to almost £850. Of that she received in October, 1897, nearly £700, and afterwards, three years later, in October, 1900, the balance, viz., £151 9*s.* 5*d.* If she had taken the whole of the money as she received it, and spent it for her own purposes, there is no question but there would have been an ademption of the legacy, because it would be impossible to get the money, and if she had applied it in any inconsistent way it would not be there in specie. But notwithstanding that she never had previously any bank account, upon receipt of the first portion of this money, on the day after she received it, she opened a banking account in the Boyle Branch of the Bank of Ireland, and she lodged this £693 8*s.* 7*d.* The account, it is true, was not headed "Trust Account," or "Residuary Account, Mrs. Wilson," but it was lodged in her own name, and no doubt by her own direction; and she procured a bank pass book and a cheque book, and she drew against the account sums amounting to £440 by different cheques—the largest being for £140, and the smallest for £16. The smaller sum was apparently paid for costs in connection with the estate of Mrs. Wilson, and in any event ought to have come out of this money before the net amount was ascertained; but as regards the sum lodged she exercised control over it, she used it as her own, and paid it away, I presume, in any way she thought fit. I observe that in some cases the payments made were in exact accordance with the codicil and as if she was acting as her own executor. That does not affect the question as to ademption. I have no doubt whatever that the legacy of £693 was adeemed to the extent of these payments.

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(1) 2 Sm. & Giff. 524 (2) 7 Ch. D. 339. (3) 30 Ch. D. 92.

But the question in the case really arises as to the balance of the fund of £247 2*s.* which was carried forward to the next year's account, other cheques being drawn against it, and there was no doubt an ademption to the extent of these payments. There remained a residue of £149 2*s.* which was never operated on or used by the lady in any way; and afterwards in October, 1900, a further sum of £151 9*s.* 5*d.* was received from the estate by Dr. Clarke, and lodged to the credit of the account of the residuary estate, so that there remained in her account at the time of her death a sum of £300, which is really the matter now in dispute. Mr. Stubbs argues that the fact that she placed the money to her current account is evidence of an assumption of control over it, and as she used it in part it was adeemed *in toto.* I cannot conceive that this argument applies to the £151 9*s.* 5*d.* at any rate, because that sum was part of the assets and was never used by her for any purpose whatever, and I cannot consider that it does not constitute an integral part of the residuary estate because she placed it in her current account. That sum was not adeemed in consequence of anything that took place before her death.

Thus, the question seems to be practically narrowed down to the £149 2*s.* As to this sum the circumstances are these. The money was placed to her current account and the lady had control over it. Is there then an ademption? Apart from authority, the matter would in principle be analogous to a case in which a testator had got the money in bank notes and put them into a box, setting them apart as residuary estate. If the bank notes in the box were intact no doubt they would have passed. But if the box was opened and some of the bank notes removed by the testator would that prevent the rest from being regarded and treated as residuary estate unadministered? Short of receiving the money in this way she could not deal with it under the circumstances of ordinary life otherwise than by lodging it in some bank, and she never had any banking account until she started one for this purpose, and practically set the money apart in this way. The principle of ademption depends upon the destruction or alienation of the subject matter; and all the cases of ademption turn on that principle. If there is a gift of a mortgage, as in *Bridle's Case* (1), and the mortgage is paid off in the testator's lifetime, there is no mortgage for the gift to operate on. In *Stanley* v. *Potter* (1) there was a gift of an ordinary debt which was determined by payment in testator's lifetime, and the same result followed. In *Harrison* v. *Jackson* (2) there was a bequest of stock which the testator stated it was his intention to have transferred into his own name. That was never done, but it was paid off, and reinvested in other securities in the names of trustees of the testator's settlement, and it was held the legacy was adeemed. *Fryer* v. *Morris* (3) was the case of a gift "of such sum or sums of money as my executors may after my death receive on the interest note of £500." The executors did not receive any money on the note as it was paid to testatrix in her lifetime, and the legacy failed.

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(1) 4 C. P. D. 336.

There is no case I am aware of in which where the money was received, and dealt with, and kept in the ordinary way, that one circumstance alone was held to be a destruction of the property as in the case of a mortgage paid off.

For these reasons I have no doubt the doctrine of ademption does not apply to this case any further than the testatrix herself has actually taken and thereby destroyed the fund.

No case decides that if portion of a fund is adeemed the whole is adeemed. *Morgan* v. *Thomas* (4), and *Manton* v. *Tabois* (5) are authorities that there may be ademption as to part without ademption of the rest. I am of opinion that to the extent of the £300 11*s.* 5*d.* there was no ademption, and the question must be so answered.

Solicitors for all parties: *Fry and Son.*

R. W. L.

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(1) 2 Cox. Ch. Cas. 180.

(2) 7 Ch. D. 339.

(3) 9 Ves. 360.

(4) 6 Ch. D. 176.

(5) 30 Ch. D. 92.

Ross, J.
1901.
May 1.

IN THE MATTER OF THE ESTATE OF GEORGE WILLIAM THOMPSON, OWNER; CHARLES JOHN STEWART, JOHN ORMSBY MOORE VANDELEUR, EDWARD JOHN JOHNSTON, AND JOHN EDWARD TARLETON, PETITIONERS.

Landlord and tenant—Land Purchase Acts—Superior interests—Indemnity—Indemnifying lands sold under Land Purchase Acts.

Portion of lands held under a fee-farm grant were sold in the Landed Estates Court, subject to the entire rent, but bound to indemnify the remainder of the lands therefrom. These indemnifying lands were subsequently being sold to the tenants:—

Held, that the entire of the rent should be redeemed, and not, as the owner of the rent contended, an apportioned part thereof only, as an apportionment would necessitate the retention for ever of an adequate part of the purchase money as an indemnity.

APPLICATION on behalf of the petitioners for an order directing the redemption of the fee-farm rent of £47 14*s.* 5*d.* reserved by an indenture of fee-farm grant dated the 20th June, 1856. The lands out of which this fee-farm rent issued were sold in the Landed Estates Court in 1865 in three lots, all of which were sold subject to the fee-farm rent, but one lot was sold primarily liable to same, and bound to indemnify the remaining two lots. This lot comprised the estate herein, which had been sold to the tenants through the medium of the Irish Land Commission, and it became necessary to redem the fee-farm rent. The owner of the fee-farm rent required it to be apportioned and redeemed.

Leech, for the petitioners:—

The entire rent should be redeemed: if the apportionment claimed by the owner of the fee-farm rent were made, and the apportioned part put upon the land herein redeemed, the liability to indemnify the remainder of the lands would not be got rid of; for it would be necessary to retain here a sum sufficient to satisfy the indemnity which the owner of the other lands would be entitled to, on his having to pay the apportioned part. *In re Gabbett's Estate* (1) is distinguishable; there the annuity was only a life annuity: here the rent is perpetual. The redemption should be made if it appears expedient to do so: *In re Pentland's Estate* (2).

Bowen, for the owner of the fee-farm rent:—

The rent ought to be apportioned, and the part apportioned on the lands for sale should be redeemed. This right was recognised in *In re Gabbett's Estate* (1). We are satisfied with our security which is ample. We were not parties to the arrangement about the indemnity.

Ross, J.:—

I think the words "as shall appear equitable" in this 31st section, sub-section 3, mean that the Court should have regard to the equities not merely of the owners of superior interests, but also to those of persons interested in the estate. What "appears to be equitable" is a different question in each particular case. In *In re Gabbett's Estate* (1), although the funds were tied up for a time, still the matter would end when the life annuity ceased. In this case it would be necessary to keep the money in Court for ever. Lands, the rental of which amounted to almost £300 per annum, have been sold here; and other lands of which the rental is over £200 per annum, are not for sale. All these were subject to the fee-farm rent, but the lands sold in this matter are bound to indemnify the lands not for sale. The result of not redeeming the entire would be that the owner of the fee-farm rent would in the first place come down upon the lands not sold, and that owners of these lands would then come here to get the benefit of the indemnity out of the moneys retained in Court for the purpose. I shall order the redemption of the entire.

Solicitor having carriage: *Edward C. Jameson.*

Solicitors for the owners of the fee-farm rent: *Corker & Lewis.*

W. C. S.

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(1) [1900] 1 I. R. 198.

(2) 22 L. R. Ir. 649.

M. R.
1901.
May 9.

ROCHE *v.* M'DERMOTT.

(1901. No. 306.)

Will—Legacy—Bequest to Rector of Jesuit Order in aid of school—Validity of—Illegality—Roman Catholic Relief Act—Scope of legislation—Legacy on condition—Undertaking to keep grave in order—Moral obligation—Rule against perpetuities—10 *Geo.* 4, *c.* 7.

A testratrix by her will made the following bequest:—"I leave to the rector of the Jesuits at M. in aid of the school there, for the training of pupils intended for the church, the sum of £500."

The school at M. was the property of, and managed by, the Jesuit Order. It was divided into two parts, one of which was a lay boarding school, and the other was an apostolic school, where students were educated for the church, some for the secular priesthood, and some (if they so elected) for the Jesuit or other Order, all these apostolic students being intended to act as missionaries in foreign parts. There was no pecuniary profit to the Jesuit Order from the apostolic portion of the school.

Held, that the gift was not invalid as being contrary to the policy of the Roman Catholic Relief Act (10 Geo. 4, c. 7), or as directly tending to train up students to be Jesuits.

Bequest of £500 to the treasurer of the Society of St. Vincent de Paul, at L., for the benefit of the poor of L., "on condition that the committee of said society shall undertake in writing to my executors to have the railing and ironwork of the two vaults in St. L.'s cemetery . . . painted once in every three years."

Held, a valid bequest.

ADJOURNED SUMMONS.

By her will dated 27th September, 1898, Catherine Roche (amongst other things) made the following bequests, viz.:—"I leave to the Rector of the Jesuits at Mungret in aid of the school there for the training of pupils intended for the church the sum of five hundred pounds," and "to the Treasurer of the Society of Saint Vincent de Paul in Limerick for the benefit of the poor of Limerick the sum of five hundred pounds."

By a codicil to her will dated 30th September, 1898, testatrix provided as follows:—"I also hereby declare that the bequest of

£500 to the Society of Saint Vincent de Paul is bequeathed to the Society on condition that the committee of said Society shall undertake in writing to my executors to have the railing and iron-work of the two vaults in Saint Laurence's cemetery, in one of which my mother and in the other of which my dear husband is interred, painted once in every three years." The testatrix died on 2nd March, 1901, and probate of her will and codicil was on 19th of same month granted to the plaintiffs as executors thereof. On 13th April, 1901, the plaintiffs issued a summons asking for the determination of the questions arising on the construction of the will of the testatrix.

With reference to the legacy of £500 to the rector of the Jesuit school or college of Mungret evidence was given that it was the property of and managed by the Jesuit Order, and consisted of a lay boarding school and a school which was called an apostolic school in which pupils were educated for the Roman Catholic church, some for the secular priesthood, and some, if they so elected, for the Jesuit or other Order. All the apostolic students were admitted to the college on the understanding that they were to become missionaries abroad. They sometimes discharged the duties of secular priests abroad. The United Kingdom was excluded from their missions. The schools for both lay and apostolic students were in the same building. They used the same fields and play-grounds, and for certain duties mixed together; they had both the same professors. There were about eighty-three lay pupils and forty-six apostolic pupils. The funds of the apostolic and lay schools were kept distinct. A profit was derived out of the lay school, but no profit from the apostolic school. Any new bequest was treated as provision for an additional apostolic student. Some of the apostolic students acted as prefects or monitors in the lay school. The apostolic students were subject to a discipline that the lay students were not subject to. Any apostolic students who elected to join the Jesuit or other Order usually decided on adopting that course in the last year of his training. The declaration of intention to do so was only made just before leaving the college.

Brereton Barry, K.C. (with him, *Roche*) submitted the questions arising for the decision of the Court.

O'Connor, K.C., and *C. F. Doyle*, for the defendant Patrick Bourke, in support of the bequest to the Society of St. Vincent de Paul:—

The will and the codicil must be taken together. There is no dedication of any part of the fund bequeathed to the painting of the graves. That is not the object of the gift. There is a good gift to the poor of Limerick by means of the treasurer of this Society. The testatrix has imposed an honorary obligation on the Society to see that the railings and iron work are painted. The giving and acceptance of the written undertaking is the only condition precedent to the gift taking effect, and does not involve any breach of the law against perpetuities. The testatrix must be taken to have known the law. The undertaking may not be legally enforcible. It is merely an obligation on the conscience of the committee: *Brannigan* v. *Murphy* (1); *Tyler* v. *Tyler* (2); *Bird* v. *Lee* (3); *Dawson* v. *Small* (4).

D. F. Browne, for the Rev. William Henry, Rector of the Jesuits' College at Mungret.

The Rector of the Jesuits' College at Mungret is not disqualified by his office from being a legatee if the object of the gift is a good charity: *Carbery* v. *Cox* (5); or if the purpose of the gift be not illegal: *Bradshaw* v. *Jackman* (6).

The object of this gift is not the Jesuit Order, but a school carried on by them. This school is not a source of profit to the Jesuits, nor is it a school the students in which intend to be or are educated or trained as Jesuits; it is merely a school for the education of students who desire to become missionary priests abroad. That is a good charitable purpose, and this bequest is capable of taking effect: *Hearn* v. *Donnellan*, not reported, but referred to in the judgment of the Vice-Chancellor, in *Murphy* v. *Cheevers* (7). The order on further consideration in *Hearn* v. *Donnellan* shows that the question was decided after argument.

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(1) [1896] 1 I. R. 418.
(2) [1891] 3 Ch. D. 252.
(3) [1901] 1 Ch. D. 715.
(4) L. R. 18 Eq. 114.
(5) 3 Ir. Ch. R. 231.
(6) 21 L. R. Ir. 12.
(7) 17 L. R. Ir. 205.

This gift is not contrary to the policy of 10 Geo. 4, c. 7, as it is not for the training of Jesuits, and persons educated in this school cannot remain within the United Kingdom.

Kehoe, K.C., and *D. M'C. Mahony*, for the defendant Florence M'Cann, one of the next-of-kin of the deceased.

The gifts of £500 to the treasurer of the Society of St. Vincent de Paul and to the Rector of the Jesuit College are both void, and as to them there is an intestacy.

1. As to the gift of £500 to the treasurer of the Society, the giving of an undertaking by the committee must mean an effective undertaking—one legally enforcible—a mere personal undertaking is not contemplated. The condition imposes on this £500 or on the funds of the Society an obligation to pay for the repairs every three years, and that means tying up the money for ever.

Acherley v. *Vernon* (1) shows that a condition as to the release of a claim means that an effectual release must be given. Once the Society accepts the gift it is bound by the condition: *Attorney-General* v. *Christ's Hospital* (2). The obligation being one to bind for ever for a purpose not charitable, the gift fails. The valid and void parts of the gift are inseparable. See the observations of the Master of the Rolls in *In re Cullimore's Trusts* (3) at p. 25. In discussing that case he says, "such are the objects which the testator has himself indicated, and though possibly some of them, apart from the others, might be sustained, it must be borne in mind that a legacy cannot be supported as charitable if some of the objects are charitable and some not."

2. As to the bequest to the Rector of the Jesuit College—This is a gift for the furtherance and profit of the Order of Jesuits in this country, and as such must be held invalid. Any member of the Jesuit Order residing here is guilty of a misdemeanour. See 10 Geo. 4, c. 7, s. 29. And section 29 of 7 & 8 Vict., c. 97, continues the disability of the Jesuits to receive a devise or bequest in favour of the Order. The circumstances of this case show clearly that for all practical purposes the lay and apostolic schools are indivisible, and any bequest to the apostolic part of the school

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(1) Willes, 153. (2) 1 Russ. & Myl., 626. (3) 27 L. R. Ir. 18.

must benefit the other. The apostolic students perform duties for the benefit of the lay scholars. The gift tends both directly and indirectly to the benefit of the Jesuit Order. It tends to the support and perpetuation of the Order within the realm and to the education of persons some of whom become Jesuits.

Carbery v. *Cox* (1) does not rule this case because there the monks of Shandon were merely instruments for the purpose of conveying the benefit of clothing to the poor school children, and could not possibly derive any advantage for themselves out of the gift.

Sims v. *Quinlan* (2) governs the present case.

Morphy, for the Attorney-General, cited *In re Birkett* (3).

THE MASTER OF THE ROLLS:—

The first gift in question in the will, is "To the Treasurer of the Society of St. Vincent de Paul in Limerick, for the benefit of the poor of Limerick £500." Now of course, if the matter rested there, a gift to the Treasurer for the time being as *persona designata* for the benefit of the poor of Limerick would undoubtedly be a good gift. Every farthing of the money would be impressed with the trust, and his would be merely the hand to convey the fund to the persons entitled. But the complication arises by reason of the codicil whereby the testator directs as follows:—"I also hereby declare that the bequest to the Society of St. Vincent de Paul is bequeathed to the Society on condition that the committee of said Society shall undertake in writing to my executors to have the railing and iron work of the two vaults in St. Laurence's cemetery, in one of which my mother, and in the other of which my dear husband is interred, painted once in every three years."

No question arises in reference to the Society of St. Vincent de Paul in relation to the Catholic Emancipation Act, or rather the exceptions from it. The only illegality alleged in reference to the bequest is that it is said that, the will and codicil being read together, an illegality is occasioned by the imposition of an illegal condition as regards the bequest of £500, as transgressing the rule against perpetuities. It is not pretended that any portion of the gift to the charity is to be deducted for the purpose of painting the railing round the grave. The question arises as regards the imposition of a condition alleged to be illegal. The poor of Limerick are the objects of the gift, and they are entitled to the benefit of every farthing of the £500, and to spend any part of it in any other way than for their benefit would be a breach of trust. The provision in the codicil as regards the grave, undoubtedly, transgresses the rule against perpetuity if it imposes an obligation to continue spending money on the grave for an indefinite time. But that is not the question here. I must assume, unless the contrary is shown, that this lady whose will and codicil—except for one or two slips—have been carefully prepared, did not suppose that a legal condition could be imposed so as to tie up money indefinitely for the purpose of painting a grave. I must assume that she and her advisers had the ordinary knowledge of law imputed to every one. She directs that the committee of the Society are as a condition precedent to taking her gift for the poor of Limerick to *undertake in writing* "to have the railing and ironwork of the two vaults . . . painted once in every three years." It was much pressed in argument that that meant that the committee must give a valid and binding undertaking about the grave. Assuming that the testatrix knew the law to be that such an undertaking could not be enforced, she selects the committee of a well-known charitable organization in whom she placed trust and confidence, and she exacts from them an undertaking about her family vault, without which it is impossible that the legacy can be paid to them. If they give the undertaking, what is the effect of it? There is no illegality whatever in their doing so. It may not be binding, and might ultimately be repudiated. No action could be successfully maintained for breach of such an undertaking. Still, it is not *malum in se.* There is no moral harm in painting a grave. Probably it will be found to be the fact in many cases—I know it is in some—that, in consideration of a sum paid down, the authorities of public cemeteries undertake to keep a grave in proper repair for ever. That was exactly the state of mind of this lady; she thought that the best way to provide for the care of her family grave was by getting an undertaking that this would be done; an undertaking, which, though not valid in point of law, was practically certain to be carried out, or at least would go as near certainty as could be attained. The condition is not the perpetual preservation of the grave, but the undertaking to preserve it. There is nothing illegal in such a condition. In *Tyler's Case* (1) there was a gift of a fund to trustees of a charity with a gift over in the event of their not complying with a condition contained in the will as to the repair of the family vault: and the condition was held to be valid. In this case there is nothing illegal in the provision in the codicil. If there were anything immoral or illegal in the undertaking to be signed the question would be totally different. The undertaking only amounts to a promise to do a thing which the committee, and their successors, though not compellable to do so, will perform if they are honourable men. I shall declare that the gift is a valid charitable bequest.

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(1) 3 Ir. Ch. R. 231. (2) 16 Ir. Ch. R. 191. (3) 9 Ch. D. 576.

The second question raised in this case is totally different from that in reference to the first gift. This does depend exclusively upon the question of legality and not upon the question of perpetuity. The gift is "I leave to the Rector of the Jesuits' College, at Mungret, in aid of the school there, for the training of pupils intended for the church, the sum of £500."

It is not contended that a gift to the rector of a Jesuit College in aid of general purposes of education would be void, because the fact that the legatee is described as the Rector of a Jesuit College cannot deprive any lawful legatee of the benefit of his legacy. The Catholic Emancipation Act does not prevent him from taking a legacy for his own benefit, and obviously does not prevent him from taking a legacy in trust for any legal object. This gift, however, is "in aid of the school there," that is, a school under the management and control and the property of the Jesuits. If it stopped there, possibly no valid charitable trust might be created, but the bequest goes on, "for the training of pupils intended for the church." That is the main scope and object of the gift, though it is to be carried out by the Jesuits. It is said that the gift is void for two reasons. First, because it is really a gift for the benefit of the Jesuit Order, and as such coming within the section of the Act of 1829. But how does it tend to the benefit of the Jesuit Order? Mr. Kehoe argued that it tended both directly and indirectly to the benefit of the Order. It is no doubt for the benefit of the school. But as regards any benefit for the Jesuit College he found some difficulty in showing that. It was said that it would improve the school as a whole, and tend, therefore, to increase the emoluments of the Order. But it has been proved to my satisfaction—because it is sworn to and has not been contradicted—that there is no profit realized by any one out of the school, and that the money in this case would be devoted not to the purpose of paying debts, or for the general purposes of the Order, but to bringing in an additional pupil. That would be in accordance with what the testatrix wished, and will be carried into effect if it be a lawful purpose. But it is said that the gift tends to the pecuniary benefit of the Order in this way, that the result would be to bring in an additional apostolic student, and inasmuch as the services of some of the apostolic students are used as monitors for instructing the lay scholars, that this would tend to benefit the lay school, and, therefore, confer an indirect benefit on the Order. That is a roundabout benefit after all. It comes to this, that, possibly if none of the apostolic students acted as prefects, it might be necessary to employ another prefect: and dealing with the case of one additional pupil added to the previous forty-six apostolic students, it is conceivable that he may be taken to represent one-forty-seventh part of an addditional prefect, and so the Order might benefit to that extent. I cannot regard that as anything directly arising in the nature of a pecuniary benefit for the Order as distinguished from the school. The testatrix has selected persons in whom she has confidence, and they are bound in honour and conscience to carry out her wishes, as I am sure they will do. If they were to apply the bequest to any other uses than those which she desired, it would be dishonest on their part. As to the effect of the exception in the Catholic Emancipation Act, that is as to this bequest being contrary to the scope of the legislation of 1829 (10 Geo. 4, c. 7), it is said that this is really a gift the object of which is to be worked out by the Jesuits through schools managed by them. I have very often said that it appears to me, to be a crying injustice that a system of law depending upon religious disabilities should be enforced in this

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(1) [1891] 3 Ch. D. 252.

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branch of the Courts in reference to property, and used as an engine for the purpose of defeating the otherwise lawful intentions of testators, when it was not directly intended for that purpose, and when the enactments themselves have been allowed to become a dead letter for the last eighty-two years. It is said that this college at Mungret is illegal; that the institutions of the Jesuits are illegal; that the members of it are liable to indictment for misdemeanour by reason of their very existence in this country. Though no statesman or public person dreams of putting this law into force directly, and in the only way specifically contemplated, it is left to the Judges of the Chancery Division to apply and enforce it in relation to questions of property and questions of charities otherwise perfectly legal and praiseworthy; and thus indirectly to enforce a law which never is, and can now never be, directly enforced. I have, however, to deal with the matter as it stands, and I do not decide it on the ground of any feeling of sympathy. If I have any sympathy it is in favour of carrying out the wishes of testators when possible. This is not a gift to the Jesuits themselves for the support and maintenance of members of their Order, like the case of a gift to the Dominicans in *Sims* v. *Quinlan* (1), where the bequest was held void. The unreported case of *Hearn* v. *Donnellan* (2) determined by the Vice-Chancellor, seems in all essentials undistinguishable from the present. I have the order made in that case before me. There is no distinction between the two cases. In *Hearn* v. *Donnellan* (2) one of the legacies held to be valid, was given to the parish priest of Ballinrobe and the lay Prior of the third Order of St. Dominick, Ballinrobe, and the survivor, in trust to divide the dividends among the poorest members of the third Order of Saint Dominick: and another legacy to the Christian Brothers for the purposes of their school, was also held good. In *Murphy* v. *Cheevers* (3), the Vice-Chancellor refers to *Hearn* v. *Donnellan* (4), in reference to the latter bequest, and the report shows that the case was decided deliberately, and not afterwards disapproved of.

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(1) 16 Ir. Ch. R. 191.

(2) Referred to in *Murphy* v. *Cheevers* and in Hamilton on Charities, p. 100, as *Heron* v. *Donellan*—[REP.]

(3) 17 L. R. Ir. 205.

(4) *Hearn* v. *Donellan.*—In this case, by order on further consideration, dated 31st January, 1881, the Vice-Chancellor declared "that the legatees No. 5 in

The decision commends itself to my own judgment, and there only remains this argument to be dealt with, that this is a gift for the purpose of training up persons to be Jesuits. That failed because the Rector says that the pupils who go to the school do not make selection of the Order, to which they desire to belong, until the last year. All the pupils are intended for missionary service abroad. They may belong to the Jesuit Order, or to the Dominican Order or perhaps they may not join any Order at all.

the said second schedule are entitled to a transfer of two of the National Bank shares in the said schedule mentioned and the dividends accrued thereon since the death of the testator in satisfaction of said bequest, and this Court doth declare the legacy No. 6 in the said 2nd schedule is payable to the Most Rev. John M'Hale, Archbishop of Tuam, the Rev. James Ronayne, the surviving trustees of the deed of the 12th June, 1877, in the certificate mentioned, to be held and applied by them upon the same trusts and subject to the same conditions as by said deed declared respecting the National Bank shares therein mentioned."

SCHEDULE REFERRED TO.

"5. Parish Priest of Ballinrobe and the lay prior of the 3rd Order of Saint Dominick, Ballinrobe, and the survivor in trust to divide the dividends arising each year among the poorest members of the 3rd Order of said Saint Dominick, Ballinrobe.	"Two of the testator's shares in the National Bank which testator directed to be transferred to their names. The Parish Priest and Lay Prior are the Very Rev. James Canon Ronayne and Patrick Burke.
"6. The Christian Brothers of Ballinrobe."	"Two of the said National Bank shares. "The testator directed these shares to be added to eight shares stated by him to have been previously transferred, and upon the same conditions as he had previously given the same. The conditions are contained in a certain deed dated 12th June, 1877, executed by him to the Most Rev. John M'Hale, Very Rev. James Canon Ronayne and testator, and are vested in them for the maintenance of the Christian Brothers' Schools in Ballinrobe."—[Rep.]

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It is not shown that there is any special inducement offered to them to become Jesuits, and there is certainly no such obligation upon them. It is not the direct object of this gift to train up pupils to be Jesuits. The gift is not so tainted with illegality so as to render it possible for me to decide that it is invalid.

Solicitor for the executor: *Roche.*
Solicitors for the defendant Rev. William Henry: *J. H. Walsh & Co.*
Solicitor for the defendant Bourke: *Dundon.*
Solicitor for the defendant Mrs. M'Cann: *Kilbride.*
Solicitor for the Attorney-General: *Warren.*

R. W. L.

Appeal.
1901.
May 4, 5.

GRAHAM *v.* M'CASHIN (1).

Executors—Liabilities—Action in Probate Court to establish will—Compromise—Agreement to pay sum out of the assets to buy off opposition—Abortive proceedings—Assets subsequently not sufficient to pay legatees in full.

A testator died in 1894, leaving assets, which were supposed to be worth over £15,000. He made his will the night before he died, appointing the defendants executors and trustees, and left legacies of £4000 to each of two nieces, both of whom were minors, and a large number of other legacies, amounting in pecuniary value to £13,800. A brother of the testator, who was supposed to be the heir-at-law, but to whom nothing had been left, entered a *caveat* against probate being granted. The executors brought an action in the Probate Court to establish the will, which was tried in January, 1895, when the executors compromised the suit by paying the caveator £2000, and £300 for his costs.

In 1896 an elder brother of the testator, who had emigrated to Australia over twenty years before, and had not been heard of for many years, returned to Ireland, and brought an action to have probate recalled, and the will set aside. The action was tried in April, 1897, when the jury disagreed. The action was tried a second time in 1898, when a verdict was found in favour of the will, omitting certain clauses.

In an action to administer the estate of the testator the assets were found insufficient to pay the legacies:—

(1) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

Held (affirming the decision of the Vice-Chancellor), that the executors were not entitled to credit for the sums of money spent in compromising the first probate suit; but *Held* (varying the order of the Vice-Chancellor), that the executors were entitled to their costs in the first probate suit.

Appeal from so much of an order of the Vice-Chancellor dated the 21st February, 1901, as disallowed to the defendants the costs of the first probate suit, and the sum of £2000 paid by them to James Smith for the purpose of compromising the first probate action and £300 for his costs.

The action was brought to administer the assets of John Smith who died on the 20th September, 1894. The testator who resided at Belfast, left personal estate which was supposed to be value for over £15,000, and the real estate and chattels real realized £3150. The testator was a bachelor who had been professedly a Presbyterian during his life, until a few months before his death, when he became a Roman Catholic. By his will dated the 19th September, 1894, the evening before he died, the testator appointed the Rev. Mark M'Cashin and William M'Cormick, his executors and trustees, and devised and bequeathed to them all his real and personal property upon trust to invest £4000 for each of his nieces Jennie Smith and Annie Smith, both of whom were minors; in the event of the death of his nieces before attaining twenty-one he directed his trustees to pay the said two sums of £4000 to the Superioress of the Convent of the Sacred Heart, Lisburn; he left £2000 to the young men in his employment; £1000 to the Rev. Daniel M'Cashin to be applied for Masses for the repose of his soul, to be celebrated within five years after his death; £1000 to his housekeeper, Agnes Kane; £500 to his sister, Mrs. Duffin; £300 to his cousin Margaret Gibson; £100 to the Superioress of the Sisters of Mercy, Belfast; £100 to the Rev. Anthony Carroll; £300 to the Rev. Mark M'Cashin, and £100 to William M'Cormick the executors. All the foregoing legacies were to be free of legacy duty, and he directed his executors and trustees to distribute the residue among the various branches or conferences of the Society of St. Vincent de Paul in Belfast, Ballymacarratt, Ardoyne, and Ligoniel. In case any of the foregoing legacies being, for any reason, void or illegal, then the same were to become the sole and absolute property of his executors, and he appointed his trustees and executors residuary legatees.

The testator's brother, Dr. James Smith did not take anything by this will, but by a former will made in 1893, a legacy of £2000 had been left to him, and also a rentcharge of £150 a-year out of a house in Cromac-street, Belfast. The will of 1893 gave legacies of £250 each to Miss Jennie Smith and Miss Annie Smith.

Dr. James Smith entered a *caveat* against probate of the will being granted, and the executors commenced a suit on the 1st November, 1894, to have the will established. James Smith filed a defence alleging undue influence and want of testamentary capacity. The case came on for trial on the 29th January, 1895, when the executors under the advice of counsel compromised the litigation with Dr. James Smith on the terms that Dr. Smith should receive £2000 out of the assets and £300 for his costs. Counsel for the minors advised the adoption of this course. The full terms of the consent which was made a rule of Court on the 29th January, 1895, were that the defendant withdrew all pleas and consented to the will alleged being admitted to proof on the terms following:—

1. The executors should pay to the defendant all debts due to him by the deceased.

2. The executors should within three months from the date of the consent pay to the defendant or adequately secure the sum of £2000, together with the sum of £300 in full for his costs.

3. The plaintiffs in their personal and not in their representative capacity contract with the defendant to pay the said sum of £2000 and £300 within three months from the date of the consent, or to adequately secure the same.

4. The plaintiffs do not ask for costs against the defendants, and if the same are ordered or awarded by the Court, undertake not to levy the same or deduct same from the moneys payable by them in their representative or personal capacity to the defendants.

5. The defendant contracts in the event of the will then admitted to probate being thereafter at any time successfully contested to assign to the plaintiffs, their executors, and adminis-

trators, any claim which he might have to the assets of the deceased as well in his character of heir-at-law or as next-of-kin of the deceased, to be held by them on the trusts of the said will.

At the time of the trial it was believed by all parties that James Smith was the only surviving brother and heir-at-law of the testator, and that William, an elder brother who had emigrated to Australia over twenty years before, and had never been heard of, was dead.

William Smith returned to Ireland, and on the 2nd December, 1896, issued a writ of summons to have the probate recalled, and the will set aside. The action was tried before Gibson, J., in April, 1897, for five days, and the jury disagreed. The case was tried again in January, 1898, before Palles, C.B., when after a trial which lasted for four days, the jury struck out some of the bequests, and found in favour of the remaining portions of the will. The clauses of the will which were condemned were :—The gift over to the Superioress of the convent at Lisburn in the event of the nieces dying under twenty-one ; the legacy of £1000 to the Rev. Daniel M'Cashin for Masses ; the declaration that the legacies were to be free of legacy duty ; and the clause providing that if any of the legacies were void they should go to the executors.

The Judge allowed William Smith his costs of the action up to the termination of the first trial except such portion thereof as were occasioned by the allegation of undue influence, and portions of his costs incurred subsequently to said trial, and he ordered him to pay the general costs of the suit incurred after the said first trial, as at that trial the allegations of undue influence had been disproved. Mrs. Duffin was also declared entitled to certain costs in the suit which had been taxed at £94 5*s.* 8*d.*

The executors' costs of the first probate suit were taxed at £445 17*s.*, and these had been paid by the executors, and their costs of the second trial amounted to £995 17*s.* 4*d.* The present action to administer the assets of John Smith had been instituted in 1896 by Joseph Graham, one of the young men in the testator's employment, as a legatee. In taking the accounts the Chief Clerk found that the executors had received personal estate to the extent of £15,834 0*s.* 7*d.*, and that they were entitled to credit for £12,418 11*s.* 8*d.*, leaving £3415 8*s.* 11*d.* due by them. This sum of £3415 8*s.* 11*d.* included the £2000 paid by the executors to Dr. James Smith to compromise the first probate suit, the £300 paid to him for his costs, and their own costs in the probate litigation.

The entire assets (including this sum of £3415 8*s.* 11*d.*) amounted to £9356 7*s.* 5*d.*, which was wholly insufficient to pay the legacies. On the hearing on further consideration dated the 21st February, 1901, the Vice-Chancellor affirmed the ruling of the Chief Clerk, and ordered the executors to bring in the sum of £3415 8*s.* 11*d.* From that order the executors appealed.

The Macdermot, K. C., *Campbell, K. C.*, and *E. Cuming*, for the appellants :—

The compromise was made in the interest of all parties, and enured for the benefit of the legatees. The duty of the executors was to obtain probate; they acted *bona fide*, and for the benefit of the assets. A Court of Equity will not, under the circumstances, hold the executors liable for consequences which no one could foresee. The title of the executor relates back to the death of the testator. The law regards him as executor and trustee; but for the purpose of clothing himself with the legal title he has to take out probate. When they were met by adverse litigation they had to obtain probate of the will on the best terms they could for all parties interested in the assets. The executors are protected by section 21 of the Trustee Act of 1893.

Harrison, K.C., *Hume, K.C.*, and *M'Ilroy*, for the plaintiff :—

This case does not come within section 21 of the Trustee Act, which only applies to the case of trusts created by deeds and wills: *Abdallah* v. *Rickards* (1). The executors have no right to spend the assets in effecting a compromise at the expense of the legatees, without their consent. If they do, they do so at their own risk. Moreover, here the two largest legatees were minors, who cannot consent. [They referred to *Kelly* v. *Kelly* (2), and *In re Bagot's Estate* (3).]

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(1) 4 *Times* R. 622. (2) 21 L. R. Ir. 243. (3) [1901] 1 I. R. 496.

Fitz Gibbon, L.J. :—

Appeal.
1901.
Graham
v.
M'Cashin.
May 5.

This is an appeal from two parts of an order of the Vice-Chancellor made upon taking the accounts in an administration suit against the defendants as the executors of John Smith, deceased. The matters under appeal are, 1, the disallowance of the defendants' costs of the first probate suit, and, 2, the disallowance of credit to the defendants of the sums of £2000 and £300 for costs, paid by them to James Smith for the compromise of the same suit, in which he disputed the will, of which the defendants are the executors. An important question is involved, as well as serious pecuniary liability for the executors. It appears to us that the costs incurred by the executors themselves rest on a different principle from that which applies to the sums voluntarily paid by them to the opposite party to get rid of the litigation. It is necessary to state the facts, which are by no means unusual, and for which litigants in the Probate Court should be prepared.

John Smith the testator made two wills, one in 1893, and the other in 1894, but the last in date only has been the subject of litigation. He made it late in the evening before his death, which occurred at 5 o'clock next morning, so that it was a will made *in extremis*; in addition, it indicated an extensive change of testamentary intention, and a complete change of religion. Accordingly, it was a will which challenged dispute, but the executors are entitled to whatever benefit they can derive from a belief that it was a good will. The case derives importance from the fact that it rules the limits within which executors can apply part of their testator's assets to buy off opposition to the will which appoints them. It is now known that the testator had a relative, William Smith, the heir-at-law and one of the next-of-kin, in existence at the time of the first suit, but not then before the Court. He was known to have gone to Australia, but whether he was still alive was doubtful. He turned up after the compromise, and re-opened the litigation. James Smith, who disputed the will in the first suit, was a younger brother of the testator and of William Smith, and he put himself forward as *contradictor*, alleging that William Smith was dead, and that he himself was the heir-at-law and next-of-kin. James Smith was named as a legatee under the will of 1893, but that will was never propounded. It is mentioned in the affidavit of scripts as a will, and James Smith, in his statement of interest said that he was heir-at-law, next-of-kin, and also a legatee under a previous will. No issue was raised as to the will of 1893: but against the will of 1894 there were pleas of want of due execution, want of testamentary capacity, want of knowledge and approval, and undue influence by the Rev. Mark M'Cashin.

The litigation went far enough in the Probate Court to show that the issues were doubtful, that the desire of the executors to obtain probate on reasonable terms was an honest one, and that in compromising the suit with James Smith they were doing what seemed best for the assets, as a matter of business, and in the interest of all parties concerned. On January 29, 1895, they made a bargain with their then only known opponent, the terms of which were embodied in a consent which the Court of Probate declined to make a Rule of Court, but which was received and entered with the Registrar, as the basis of a decree for Probate in solemn form. That consent provided that the defendant should withdraw all pleas, and consent to the alleged will being admitted to probate on the terms following:—

[The Lord Justice read the consent, *ante*, p. 406.]

The executors, therefore, promised to pay the £2000 and £300, not alone in the event or upon the condition of getting the money out of the assets, but on a personal undertaking to pay or guarantee it to James Smith. The view most favourable to the executors is that they acted in the belief that this course would secure the largest amount of benefit for the estate. I assume that, under the last clause of the consent, whatever benefit James Smith would have got under the will of 1893, if it had been set up by successfully contesting the will of 1894, would be covered by his contract to assign, though his "character" of legatee under the will of 1893 is not mentioned. I assume that, as a party to this consent, James Smith did not contemplate that if the will of 1894 was subsequently broken, and the will of 1893 established, he could retain as a legatee anything which he had, as heir-at-law or next-of-kin, contracted to assign over to the executors, and, I assume, therefore, that any and every claim which James Smith might, in any event, have on the assets was acquired by the executors in consideration of the £2300, but to be held by them on the trusts of the will of 1894, whether that will should be at any time successfully impeached or not.

Both by its nature, and by its express terms, this contract must be taken as binding the executors in their personal capacity; their personal responsibility only extended, however, to James Smith, the defendant in that suit. But they intended the contract to be for the benefit of all the beneficiaries under the will, including themselves, and they now claim that they are entitled to absolute credit for the £2300 which they paid out of the assets. In our opinion they cannot maintain this claim. It was contended, first, that there is statutory authority enabling executors to put such a charge on assets (1), by the words of the Trustee Act, 1893, sect. 21, and (2), by analogy to the provisions of that section. This statutory power of compromise was not conferred for the first time by the Trustee Act, it is given by the Conveyancing Act, sect. 37; but Walker, L.J., during the argument, stated what we hold to be the true meaning of both statutes. They give by legislation to persons in certain fiduciary positions—executors and trustees—certain defined powers which previously they could exercise only when expressly conferred by the instruments under which they acted. These sections put those to whom they apply into the same position as if the provisions of the Act were inserted in the instrument creating the trust. But in both cases you must first have an instrument which creates the fiduciary position, and that position must be established, before the Act has anything on which to operate.

No intention can be gathered from either statute of enabling a man to *create* a trust, or to acquire an executorship, at the expense of the trust property, by a compromise, and then to claim the statutory protection for the price which he has paid.

So much for the words of the Act—the argument from analogy, so far from helping executors and trustees in such cases, tells against them. It brings us face to face with a grave question of public policy, because if a claim to property could be based on a dubious instrument, and then validated at the cost of the estate, by a compromise, this would offer a premium to the executor named in a bad will, or even to a trustee claiming under a forged deed, to claim under the document, and then to accept part of the property as the price of giving up his attempt to get the whole. I ventured, in the course of the argument, to put the converse case. A compromise must be mutual; and its validity can not depend on its form: if the terms of the compromise had been that the will should be declared invalid, in consideration of the payment of a sum of money to the named executors, to be held by them upon the terms of the condemned will, it is only necessary to state the proposition in that form to see that such a compromise could not be within the statute, and that these Acts supply a strong argument against the appellants' contention.

We recently had to consider the compromise of a celebrated suit in the Probate Court in *Bagot's Estate* (1). To give effect to that compromise, it was thought necessary not only to have its terms as regards a minor's interest approved by the Court of Chancery, but also to obtain an Act of Parliament to modify the will, and to bind some parties who were not before the Court, while the rights of others were expressly saved. Holmes, L.J., in his judgment mentioned that no authority had been found for the proposition that an executor propounding a will can by a compromise charge the assets with the amount to be paid to effect the compromise, thereby reducing the estate coming to the legatees. We have now been referred to *Abdallah* v. *Rickards* (2), in which Chitty, J., says—"There was another fatal objection to a compromise of this kind, and that was that one of the questions compromised was the actual validity of the will itself—that is to say, of the executors actual title to compromise." We agree in that statement of the law, and we are all of opinion that the executors here cannot charge the property *in invitum,* or the assets in general, with the payments which they voluntarily made to an adverse litigant to buy off the opposition to their probate. Where an executor does this, unless he takes the proper steps—by citation, by obtaining consents, Chancery sanction, or an Act of Parliament, or by whatever other course the circumstances require—he, at best, must run his chance that a Court of Equity may not afterwards recognise what he has done, or that the beneficiaries will not consent to pay their shares of the money.

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(1) [1900] 1 I. R. 496.

(2) 4 *Times* R. 622.

He may take that chance if he likes, or if he has a sufficient interest of his own in the assets, out of which he can make it good. But he cannot claim credit, as of right, against the assets at large, or against minors or others not bound by his agreement, for money so paid. This case goes farther, for here the executors expressly contracted in their personal and not in their representative capacity, and it may be questionable whether this will not prevent them from claiming credit even against the other parties to the consent. The facts, as then believed to exist, explain what was done. We disregard the suggestion that this compromise was made because the Rev. Mark M'Cashin had a personal motive to get rid of the plea of undue influence. That plea must be regarded as having been entirely unfounded. But the executors believed, though unfortunately for them they were mistaken, that by settling with James Smith they were ending the litigation, and under the will they not only had personal interests as beneficiaries, but the will also contained dispositions, carried out by what has been called "the O'Hagan clause," that if the legacies failed from any cause in their primary objects, they were to go to the executors, who might do with them as they pleased. They naturally enough anticipated no difficulty in obtaining, either directly or indirectly, out of the residue of the assets, the means of meeting the amounts which they agreed to pay, in the first instance on their own personal responsibility, to James Smith. But whatever the executors bought they acquired for the benefit of the estate, and as executors, in accounting for it, they can claim credit only for what the Court can recognise to have been spent in the exercise of their equitable, if not their legal, powers. The cause of their failure is that they succeeded in binding James Smith only; they did not bind William Smith; in consequence they had to face the litigation all over again. They cannot say that the advantages for which they made the compromise have been secured. In the second suit the whole will was not proved. Important clauses were condemned by the jury on the second trial. It would be impossible now to contend that the legatees under these condemned clauses gained anything by the payment of the £2300 to James Smith, or that those who now take what those clauses purported to bequeath, got any benefit from the compromise, yet the protection claimed for the executors, if good for anything, must be good against all the assets. At the same time, the compromise was not wholly useless; it placed the executors in a better position for fighting the case afterwards; it practically got rid of the will of 1893, and of James Smith; and thus those who made it got something for their money. But still those only who signed the consent can now be held bound by it, and the executors can look only to them to share the cost of it. In the absence—as regards minors, of Chancery sanction; and—as regards others, of contract, ratification, or an Act of Parliament; we are of opinion that the Vice-Chancellor was right in holding that the executors cannot have credit for the £2000 and the £300 paid to James Smith, as against the assets which are being administered under the probate which was obtained in the subsequent proceedings.

We are not asked, and we see no reason, to question the order in so far as it gives to the executors full credit, as well for their own costs as for the costs given to other parties, in those subsequent proceedings.

But the Vice-Chancellor disallowed the executors own costs in the first Probate suit, amounting to £457 7*s.* 4*d.*, referred to in the notice of appeal as "No. 456 in the account A, referred to in the certificate." This disallowance raises an important question of principle, and we think that the executors are entitled to credit for that amount. They were not willing parties to that first Probate suit; though it was brought by James Smith on a mistaken allegation of interest, they had to meet him, and to contest the case. The Vice-Chancellor appeared to treat these costs as incurred in useless litigation; I have already said that we do not think it was wholly useless; but, useless or not, the executors had to face it, and to incur expense in doing so. If they had gone to the Probate Court, and said, "There is a man—William Smith—who may be alive in Australia, and we want to bind him, if he be alive"; they would have had to adjourn the suit for six months or more, to try to ascertain whether he was dead or alive, and to cite him if living. If he had been in the bush and had not been found, and if he did not turn up in answer to advertisements, he would have been no more bound than he was afterwards. If the will had been proved against James Smith, and the executors had paid their costs out of the assets, they could not afterwards have lost their right to credit for those costs, merely because William Smith subsequently put them to prove the will again against him. Being of opinion that the executors incurred their own costs of the first suit in good faith, and in the necessary defence of their title as executors, we think that those costs were an expense, which they could not avoid, and for which they should now have credit out of the assets which came to their hands under the will as ultimately proved.

Walker, L.J.:—

The important matter for decision in this case is the question—Are the appellants entitled to be allowed the two sums of £2000 and £300 agreed to be paid to Dr. James Smith as a compromise of the first Probate suit? The allowance was rested mainly on the 21st section of the Trustee Act of 1893; and if that section did not apply, it was rested on the ordinary principles of a Court of Equity in dealing with the acts of executors. I regret to be obliged to concur with Fitz Gibbon, L.J., that the disallowance by the Vice-Chancellor of these sums must be affirmed. The action of the executors was, I think, *bona fide*. They were propounding a will about which there was a doubt, and they thought it would be an advantage to get out of the region of dispute James Smith, and the will of 1893. The executors were propounding the will of 1894. The defence was that there was no such legal will, and when the case came on for trial in June, 1895, there was a discussion as to the terms upon which the opposition should be bought off. Having regard to the amount of the money stipulated for, and ultimately agreed on, the burden should necessarily be borne by either the residuary legatees who were charities, or by the minors, who could not consent to anything. James Smith and his advisers seem to have been alive to the difficulty, for they provide and the consent provides for a personal contract on the part of the executors to pay the £2000 and £300. The executors entered into that obligation in their personal capacity, though, no doubt, they looked forward to the assets as the ultimate fund to bear

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them, so the form of the consent is against the executors; nor could it, I think, be done without the consent of the beneficiaries as regards the Trustee Act. I pointed out during the argument that the section was intended to apply to the administration of trusts in the cases of deeds and wills. Chitty, L.J., says so too, in the case of *Abdallah* v. *Rickards* (1) that has been referred to. It does not apply to a case like the present.

Then, is there any reason why this compromise should be carried out by a Court of Equity? I cannot see why it should be. A minor can only be bound by an order of the Lord Chancellor in a Minor Matter, a precaution which was not adopted here. A sum of money has been expended out of the assets in establishing this will by a compromise, which was rendered abortive by the litigation in 1895. I am therefore of opinion that the executors are not entitled by the rules of Equity to credit for these two sums. I am glad, however, to concur with my colleagues in holding that their costs in the first action should be allowed them, as these costs were necessarily incurred in the propounding of the will.

HOLMES, L.J.:—

When the facts of the case are stated, only a few words are required to explain our judgment. The defendants found themselves named as executors in a will which was impeached, and in which they took little or no pecuniary interest. They propounded it as they were entitled to do; and on the eve of the trial, they entered into a compromise by which the will was admitted to probate.

They acted in good faith, and from their point of view, prudently; but they cannot claim to be allowed out of the assets the money paid by them to the opposing litigant for the purpose of obtaining the compromise as against legatees who did not assent, or were incapable of assenting, to the arrangement. The powers to compromise given to trustees and executors, by the Trustee Act and the Conveyancing Act, do not include either in their terms or spirit, the payment of part of the trust funds, for the purpose of obtaining the position of trustee.

(1) 4 *Times* R. 622.

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I pointed out, in *Bagot's Estate* (1), that compromises of this character are entered into by executors at their own risk, and I adhere to the observations then made by me.

The terms of the consent in the present case show that it was in the contemplation of the parties that the executors were making themselves personally liable. Of course they may be able to show that individual legatees by joining in the compromise made their share of the assets liable; but this question is not now before us.

For these reasons, I agree with the Vice-Chancellor in holding that the defendants ought not to be allowed credit for the £2000 and £300 paid to the defendant in the Probate action. I think, however, that they are entitled to their own costs in the compromised action. I am satisfied by what subsequently happened, that if that case had been fought out and the will established, the costs of suit would not have been given against the defendant litigant; but the executors would certainly have been entitled to defray them out of the assets. When the same result is obtained by means of a compromise, the executors ought to have the same right. The subsequent litigation was unfortunate; but it is impossible to say that it was caused by the compromise. It might have also arisen if the will had been established by a verdict and judgment.

Solicitors for the plaintiff: *C. & J. Black.*
Solicitors for the defendants: *M'Erlean & Thompson.*
Solicitor for Mrs. Duffin: *M. H. Turnbull.*
Solicitor for Agnes Kane: *C. E. Buckley.*

R. D. M.

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(1) [1900] 1 I. R. 496.

Appeal.
1900.
Nov. 12, 13.

TRUSTEES OF SIMPSON, LANDLORDS; FARLEY AND OTHERS, TENANTS (1).

Landlord and tenant—Land Law (Ireland) Acts, 1881–1896—*Character of holding — Demesne lands — "Lands which when first demised were demesne"—"Intended to be preserved or resumed as demesne"—Land Law (Ireland) Act,* 1896, *s.* 5, (1), (*b*), (*ii.*).

In the year 1873 P. S., who was tenant for life of an estate including a mansion house and demesne where he resided, made lettings to farmers of portions of the demesne in consideration of fines in addition to the yearly rents reserved. Shortly afterwards he auctioned his effects and ceased to reside on the property. On his death he was succeeded by C. S., who was owner in fee-simple of the property. C. S. adopted the tenancies so created by P. S., and took the rent from the tenants. C. S. never resided on the property; and he put a caretaker into the mansion-house, and by his will devised the estate to trustees to sell. The holdings let by P. S. were situated inside the ambit of the demesne; two of them adjoining the mansion-house had no buildings on them; the third comprised two acres of woodland out of an entire area of 48 acres. Two of the holdings were suitably used for agricultural and pastoral purposes: one of them was unsuitably used as a meadow, and was overmeadowed. The mansion house was at the hearing before the Land Commission in a deteriorated condition and the demesne neglected and uncared for.

Held, that the period when these holdings were "first demised" within the meaning of sect. 5 (*b*) ii. of the Land Law Act, 1896, was when C. S. came into possession of the estate as owner in fee-simple and adopted as his tenants the tenants to whom P. S. had made the lettings.

Held also, that the circumstances of the case did not show that the holdings were "intended to be preserved as demesne or resumed as demesne by the landlord," and that the tenants were entitled to fix fair rents in respect of their holdings.

APPEALS from the decision of the Irish Land Commission reversing the decision of the Sub-Commissioners and dismissing the originating notices served by the three tenants on the ground that their holdings were demesne land.

David Farley's holding consisted of 48A. 0R. 27P. statute measure, of which 16A. 3R. 20P. Irish measure were let to the tenant in 1873, as yearly tenant, at the rent of £25 4*s*., and the residue of the holding containing 10A. 0R. 20P. Irish measure, was let to the tenant in 1874 as yearly tenant at the yearly rent of 25*s*. per Irish acre. Both lettings were made by Pierce Simpson the then owner of the estate, and after the second letting the entire take was treated as one tenancy and holding at the rent of £35 17*s*. 1*d*. Pierce Simpson who made the lettings was tenant for life of the estate which comprised a good deal of property in Leitrim and other counties; a portion of this estate was known as Clongorrick Castle and Demesne, and consisted of 231A. 2R. 35P. of the lands of Clongorrick, and 14A. 2R. 35P. of the adjoining lands of Keavey. In 1873 a poster was issued by Pierce Simpson announcing that portion of the lands of Clongorrick (consisting of 71 Irish acres) would be let by auction in certain lots at 25*s*. per statute acre, the purchasers to have leases for 21 years, or for one life at their option. Whether the lands were called in the poster "the lands of Clongorrick" or "Clongorrick Demesne" did not appear, as the poster produced by the tenant was mutilated. At the auction David Farley purchased the first portion of the holding for £200, and received the following receipt signed by the agent and receiver who also appears to have been the auctioneer:—"Received from Mr. David Farley for Pierce Simpson, Esq., the sum of £200 sterling, for the tenant right of the farm in Clongorrick, Co. Leitrim, the property of Pierce Simpson, Esq., subject to the yearly rent of £25 4*s*., containing 16A. 3R. 20P., be the same more or less, Irish measure, rent to commence from 29th March, 1873, payable in half-yearly payments. Total amount £200. 21 April, 1873, credited by deposit £40; May 25, 1873, credited by cash, £160. (Signed), D. H. Crawford, Auctioneer." In 1874 the tenant took the remaining portion of the holding from the agent, paying £40, and getting the following receipt:—"Received from Mr. David Farley for Pierce Simpson, Esq., the sum of £40 for farm of land in Clongorrick, the property of Pierce Simpson, Esq., containing 10A. 0R. 20P. Irish, subject to the yearly rent of £1 5*s*. per acre, Irish, rent to commence on 25th March, 1874, payable half-yearly. (Signed), D. H. Crawford, agent for the receiver, for Pierce Simpson, Esq., the above landlord." No lease was taken out, and the tenant apparently went into possession as yearly tenant. There was an old house on the holding when the tenant purchased, and there was some evidence that the holding or portion of it had previously been tenanted by a man named Mullins, and also to have been in occupation of a man named M'Kernon who worked in some capacity for the landlord. The present tenant partially rebuilt the house. The holding lay at a little distance from Clongorrick Castle. About 2 acres of woodland were included in it, and a considerable amount of the demesne plantation adjoined and surrounded portion of it. The way into the holding from the county road lay along the back avenue past the castle out-offices, close to the back of the castle, and then turned to the left straight to the holding. The tenants on the adjoining estate in another townland had a right of way on foot to their holdings along the same way. Farley's holding was suitably used as a mixed farm of tillage, grazing, and meadow: its carrying power was nine collops; the main portion was in good condition, well cultivated, and cared.

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(1) Before LORD ASHBOURNE, C., FITZGIBBON, WALKER, and HOLMES, L.JJ.

Pierce Simpson, the tenant for life of the estate, was living at the castle when the lettings were made. Subsequent to the making of the lettings he had an auction of his effects, and left the castle, going to reside elsewhere. He died in 1875, and was succeeded by Colonel Casson Simpson, who was owner in fee. Colonel Casson Simpson did not reside at Clongorrick; he only visited it on one occasion, and died in 1896. During his life a herd, as caretaker, was living in the castle. By his will Colonel Casson Simpson devised his real property, including the Clongorrick estate, to trustees upon trust for sale. The trustees endeavoured to sell the property in the Land Judge's Court, but failed to obtain a purchaser. The trustees then made a letting of so much of the Clongorrick estate as was in hands. This letting was by lease dated 5th June, 1898, and made to William Francis Jones, therein described as a farmer. The lease demised that part of the lands of Clongorrick, including Clongorrick Castle and Demesne, then in the occupation of the trustees, and containing 79A. 3R. 23P. of Clongorrick, and two portions of Keavey, containing, respectively, 6A. 3R. 3P. and 1R. 26P., excepting and reserving all timber, &c., for thirty-one years at the rent of £40: the lease contained a covenant to keep the castle in repair and insured for £1200, and a

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Trustees of Simpson, *Landlords;* Farley and Others, *Tenants.*

proviso for resumption at the end of the fourth and every succeeding year upon six months' notice by the reversioner, in case he should require the holding for his own residence and use. The evidence produced before the Land Commission showed that Clongorrick Castle was, undoubtedly, a mansion-house of some importance; that the upper story had fallen into a state of considerable disrepair; that the remainder of the house was in fair structural condition, but required to be redecorated. The surrounding lands were described as being a demesne of considerable beauty, though as a demesne it had been let fall into a state of decay, the garden being overgrown with grass, the vinery roofless, and the avenue somewhat neglected.

In 1881, David Farley served an originating notice to fix a fair rent, and on 22nd February, 1883, the Sub-Commission, by whom the case was heard, dismissed his application upon the ground that the lands were demesne lands. No appeal by way of rehearing was taken by the tenant from this order of the Sub-Commission. On 29th December, 1896, the tenant relying upon the provisions of the Land Law (Ireland) Act, 1896, served a fresh originating notice: the Sub-Commission fixed a fair rent: the landlord appealed by way of re-hearing and the Land Commission dismissed the tenant's application, being of opinion that the circumstances showed that it was intended to preserve or resume the holding as demesne by the landlord. It was arranged at the hearing before the Land Commission that the general evidence in *Farley's Case* should be taken as applicable also to the cases of William Woods and Jane Goodman, tenants on the same estate, in which fair rents had been fixed, and in which the landlord had appealed.

Woods' holding consisted of 10a. 0r. 33p. statute measure: there were no buildings on it; and the tenant lived ten miles off. He succeeded his father, who took the holding from Pierce Simpson, and the tenant said his father paid £50 for the holding, but no receipt was produced. The holding consisted of two fields, approached by a back road or lane, leaving the county road close to the gate lodge on the front avenue to Clongorrick Castle. The holding extended towards, and at an angle touched, the garden of Clongorrick Castle. This holding was used for a meadow: it was not suitably used, and was in a deteriorated condition owing to its being overmeadowed and the hay taken off the holding.

Jane Goodman's holding consisted of 18A. 1R. 20P. It lay between Farley's holding and Clongorrick Castle: the way into it was the same as to Farley's holding: at one angle it touched the back avenue close to the garden of Clongorrick Castle; at another place it adjoined the plantation which lay immediately next the castle: there were no buildings on it. It was taken by the tenant's husband in 1873, when Pierce Simpson was owner of the estate. From a receipt produced it appeared that the tenant's husband on 11th May, 1873, paid the landlord £63 10*s*., though it was not specified for what this amount was paid. This holding was suitably used as a grazing farm with a carrying power of ten collops, and was in good condition.

The Sub-Commission fixed fair rents in both these cases as well as in *Farley's Case*, but the Land Commission dismissed the originating notices for the same reason as in *Farley's Case*.

Wakely, Q.C. and *T. J. Smyth*, for the tenants.

Fetherstonhaugh, Q.C. and *J. B. Burke*, for the landlord.

Nov. 13.

LORD ASHBOURNE, C.:—

The question in this case is whether the evidence shows that the landlord has succeeded in bringing these holdings within the terms of the exception created by section 5 (*b*) (ii.) of the Land Law (Ireland) Act, 1896, by which it is provided that the Land Law Acts are not to apply to "land which when first demised was demesne and which the provisions of the contract of tenancy or the circumstances of the case show was intended to be preserved or resumed as demesne by the landlord." This enactment made an important change in the law as to what a landlord must prove when he seeks to exclude a demesne holding from the operation of the Land Law Acts. For this purpose it was formerly sufficient for the landlord to show that the lands were demesne when demised and had not since been undemesned. Now the landlord must bring himself within the terms of the sub-section, and show that the lands were demesne when first demised, and also that they were intended to be preserved as demesne or resumed as demesne by the landlord.

The facts of these cases lie in a narrow compass. Pierce Simpson, who was then tenant for life of the lands, in the year, 1873, let the holdings on yearly tenancies, accepting substantial fines in each case. The three lots, so let, were at that time demesne land and were close to Clongorrick Castle, the family residence of the Simpsons. In the same year Pierce Simpson sold the furniture in the castle by auction, and thenceforward ceased to reside there. I would impute to him, from the fact that he took fines, from his means probably not being very large, that he thought that the demesne was too wide for the immediate enjoyment of the then proprietor: and that he made these lettings without any personal view on his own part that he would care to preserve the land let as demesne or thereafter resume it as such, or that it ever would become desirable or needful in the interests of the landlord to get the lettings back as demesne.

In 1875 Pierce Simpson was succeeded by Colonel Simpson who was tersely described by Mr. Fetherstonhaugh as an absentee: possibly his military duties prevented him residing on the place. He was owner in fee of the lands, and could have asserted his rights against the tenants of his predecessor who was only tenant for life, as I have mentioned. However, he elected to adopt the tenancies, and received the rents from the tenants, leaving the tenants in possession. In law this conduct amounted to the creation of new tenancies, and, accordingly, what occurred at this time is of the utmost importance in the case. As the law then stood the lands still continued demesne lands. Nothing was then done to alter the subject-matter demised. But I can find nothing in the acceptance of the rents by Colonel Simpson or in his leaving the tenants in possession, or in the other circumstances of the case, that indicated or showed that it was intended that these holdings should be preserved as demesne or resumed as demesne by the landlord.

When the applications to fix fair rents upon these holdings came before the Sub-Commissioners, they arrived at the conclusion that the holdings were not shown to come within the exception created by section 5, sub-section (*b*) ii. The Land Commission reversed this decision, Mr. Commissioner Fitzgerald stating in his judgment that they did so with considerable doubt. We are of opinion that the cases do not come within the statutory exception, and, accordingly, we hold that the Sub-Commissioners were right; and we allow the appeal.

FITZ GIBBON, L.J.:—

Mr. Fetherstonhaugh's argument on the Act of 1896, section 10, requires an answer. The exclusion of demesne land by the Act of 1881, section 58 (2), has been repealed by the Act of 1896, section 52; and, but for the provisions of section 5 which have been substituted for it, all agricultural or pastoral demesne land would now be within the Land Law Acts. Section 5 (1) (*b*) (ii.) enacts that "the Land Law Acts" (with an exception not material to this case) "shall not apply to a tenancy in any holding which substantially consists of land which when first demised was demesne, *and* which the provisions of the contract of tenancy, or the circumstances of the case, show was intended to be preserved as demesne *or* resumed as demesne by the landlord." That class of demesne (with the class described in the following sub-section (iii), not material to this case), and that class only, is now excluded. Formerly it was enough for the landlord to show that the holding was "demesne land," now it is a condition precedent to its exclusion that the landlord shall prove (*a*) that the land when first demised was demesne, and (*b*) that either the provisions of the contract of tenancy, or the circumstances of the case, show the intention either to preserve it as demesne or to resume it as demesne by the landlord. Now I take section 10. Sub-section (1), says:—"The Land Law Acts shall apply, . . . , in the case of tenancies created by a limited owner, . . . and the tenancies shall not be or be deemed to have been determined (except in the case of fraud, &c.), by the cesser of the interest or possession of such limited owner, . . . and the person entitled on such cesser to receive the rent of the holding shall stand in the relation of landlord to the tenant of the holding, and have the rights, and be subject to the obligations of landlord accordingly."

The rights of the parties, in cases within this sub-section, are to be the same as if the limited owner who created the tenancy had been an absolute owner; the object of the enactment is to relieve the tenant from the effect of the cesser of his lessor's estate. But Mr. Fetherstonhaugh relied upon sub-section (3):—"This section shall not apply to a tenancy created by a limited owner in a holding the substantial part of which at the date of the letting was demesne land, where the mansion-house is let with such demesne land, *or* the application of the Land Law Acts to the tenancy would materially diminish the value as a residence of the mansion-house situate on and theretofore occupied with the demesne." But this sub-section only limits the application of section 10; it does not affect section 5 at all. I may assume for Mr. Fetherstonhaugh that the facts would bring these cases within the words of section 10 (3), so far as diminution of the value as a residence of the mansion-house is concerned. But the whole section deals only with the case of tenancies created by limited owners, and the question whether the application of the Land Law Acts diminishes the value as a residence of a mansion-house is immaterial to the operation of section 5, where the tenancy has been created by an absolute owner. Section 10 cannot conflict with section 5, for the scope of section 10 is to bring into the Acts certain tenancies, when created by limited owners, which would otherwise only be within the Acts, and within section 5, when created by absolute owners.

The limited owner, Pierce Simpson, undoubtedly let these holdings to farmers, on terms and under circumstances indicating that *he* had no intention of preserving or resuming the land as demesne: so far as the contract and circumstances reveal any intention on his part, the idea of such preservation or resumption is negatived. But we are not now directly or proximately concerned with the intention of Pierce Simpson. We have already decided, in *Riggs* v. *O'Brien* (1), that the words "when first demised," in section 5 (1) (*b*) (ii.), refer to the first making of the contract of tenancy under which the land is held when the "holding" comes before the Court. Accordingly these lands were "first demised" when Colonel Simpson made the tenants his own. He was not bound, nor were the lands, by the acts or intention of

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(1) Unreported.

Fitz Gibbon, L. J.

Pierce Simpson, when he, Colonel Simpson, became the owner. He could have taken up the lands; or he could have varied the terms of the tenancy; but he did not. He adopted the lettings, and he thereby impliedly shared the intention of the previous owner; he never by any act of his own indicated any special intention on the subject; and he certainly did nothing to indicate any affirmative intention to preserve or resume the land as demesne. The letting of these outlying pieces of land to rent-paying tenants was not the act of a lunatic: the amenities of the adjoining or neighbouring lands were not thereby interfered with. The circumstances are nothing like those proved, for example, in *Watson* v. *The Duke of Abercorn* (1), where the plantations of Baronscourt surrounded the entire holding, which could only be entered by a private road through demesne land occupied by the landlord. I believe that the intention with which these lettings were made was to reduce the size of the landlord's demesne. It is also a material circumstance that Clongorrick Castle, like the place in *Mansfield* v. *Congreve* (2), was not the landlord's family residence; there was not even any furniture in the house since Pierce Simpson left it after the auction in 1873. The holdings, ever since they were let, have been ordinary agricultural or pastoral "rent-producing property," and nothing else, and I cannot exclude them from the Land Law Acts.

WALKER, L.J.:—

All these holdings were demesne lands when the tenancies were created. Before the Act of 1896, this fact was sufficient to prevent the tenants from fixing fair rents. The Act of 1896, however, made a change in the law. Now the landlord if he wishes to exclude a tenant of demesne lands from the Land Law Acts must establish both that the lands were demesne when first demised, and also that either the contract of tenancy or the circumstances of the case show that they were intended to be preserved or resumed as demesne. The intention to preserve or resume the lands as demesne cannot be gathered from the fact that the lands are demesne lands: because *ex hypothesi* they are such in character.

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(1) Unreported, 26 April, 1894.

(2) [1895] 2 I. R. 425.

Here the terms of the lettings and the circumstances under which they were made by Pierce Simpson show no intention on his part to preserve or resume these lands as demesne. Colonel Simpson, who in law must be taken to have made the lettings before the Court, and in whose time the lands were "first demised" within the meaning of section 5, adopted the action of his predecessor. He never lived at Clongorrick Castle: he directed the trustees of his will to sell the place. So far as any dealings of the landlord with the lands have been proved, there is an utter absence of any act from which an intention to resume these lands as demesne might be inferred. Mr. Fetherstonhaugh has argued that to let these holdings away from the rest of the demesne without retaining the power of resuming them would injure the value of the mansion-house as a residence, and he asks us on this ground not to infer that the landlord would have made these lettings without an intention on his part to preserve or resume them as demesne. But against that we have the actual mode of dealing adopted by the landlord, which negatives the intention. Therefore I concur with the Lord Chancellor.

HOLMES, L. J.:—

This case affords a good illustration of the change made in the law relating to demesne lands by the Land Law (Ireland) Act, 1896.

The holdings formed part of the demesne attached to an ancient and historical mansion occupied up to 1873 by Mr. Pierce Simpson, who had been owner for nearly forty years. He was a gentleman of position, and seems to have lived in good style, having carriages and horses, with everything handsome about him.

In 1873, he ceased to reside in the place, and I would infer from his sale of the furniture that, as far as he was concerned himself, he did not intend to live in it again. The property was to go to a distant relative at his death, and this accounts for the sale of the furniture; but he kept in his own hands the house and a considerable part of the demesne ready for the occupation of the remainderman if he desired to come to it.

At the time of the sale of the furniture, Mr. Simpson let

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Holmes, L.J.

portions of the land, including the three holdings with which the Court is now dealing to tenants from year to year, receiving fines therefor. He seems to have undertaken to give leases for one life, or a term of twenty-one years; but his leasing power did not enable him to take a fine, and the leases were neither made nor asked for. There is nothing to throw light on the intention of Mr. Simpson in making these lettings beyond the fact that he made them. He may have thought that the demesne was too large, and his object may have been to convert the land let into permanent agricultural holdings. Or he may have been in need of money, and in order to procure it, he may have temporarily separated the premises from the demesne, intending that they should be reunited thereto at some future time.

The same observations apply to these tenancies when they were renewed by Colonel Simpson two years later on his becoming entitled on the death of the previous tenant for life. He was out of the country, and had no immediate intention of residing in the mansion-house. He therefore took the tenants as he found them, thus technically creating new tenancies. There is no evidence from which any intention on his part can be inferred, and he probably had no intention. In this state of circumstances under the law as it stood before 1896, the lands continued demesne lands, there being no evidence of an intention at the time of the lettings to alter permanently their character. But under the last Act, it must be assumed that the letting deprived them of the character of demesne, unless an intention to preserve or resume them as demesne can be inferred from the terms of the contract or the circumstances of the case. The only circumstance here relied on is the situation of the lands. Now, the question of situation may be important. The premises let may be so situated with regard to the mansion-house and demesne that is retained in the owner's hands, as to show that a permanent severance was not intended; but this feature does not exist in any of the three holdings before the Court.

Solicitors for the tenant: *Allen & Halpin.*

Solicitors for the landlord: *J. Burke & Son.*

G. Y. D.

TEVLIN *v.* GILSENAN.

(1901. No. 110.)

V.-C.
1901.
April 22.
June 4.

Judgment mortgage—Judgment against one of next-of-kin of intestate—Registration as mortgage against interest in intestate's chattels real—Invalidity of—13 *&* 14 *Vict. c.* 29.

The right of a next-of-kin to a share of the personal estate of an intestate, consisting in whole or in part of chattel interests in land, is not such an estate or interest in the lands as is capable of being attached by a judgment mortgage under 13 & 14 Vict. c. 29, sects. 6, 7.

In re Carolan and Scott's Contract ([1899] 1 I. R. 1) followed, notwithstanding *Tench* v. *Glennon* (34 I. L. T. R. 157).

ORIGINATING SUMMONS taken out by Ellen Tevlin for the administration of the personal estate of Patrick Gilsenan deceased, the defendants being Nicholas Gilsenan and Michael Gilsenan.

The plaintiff's affidavit to ground the application stated:—Patrick Gilsenan died on the 3rd July, 1881, intestate, leaving a widow and three brothers, namely, the defendants and another, and one sister, his next-of-kin him surviving. On the 23rd January, 1882, letters of administration were granted to the defendants; the assets consisted in part of a chattel interest in a farm of land at Tankardstown, county Meath; the plaintiff as executrix of one Richard Tevlin on the 12th May, 1899, recovered judgment for £150 against the defendant Nicholas Gilsenan personally, and on the 20th May, 1899, registered such judgment as a mortgage against the said defendant's interest in said land. Nicholas Gilsenan had been for many years in sole occupation of the said farm, and on the 30th March, 1892, had had a fair rent fixed in respect of same in his own name: the said sum of £150 was due by him in respect of rent and taxes of the said farm paid by Richard Tevlin.

W. H. Brown, for the plaintiff :—

A mortgagee of the share of a next-of-kin may maintain a suit for administration : *Sweeny* v. *Gallagher* (1).

P. A. O'C. White, for the defendant Nicholas Gilsenan.

A judgment cannot be registered as a mortgage against the share of a next-of-kin : *In re Carolan and Scott's Contract* (2).

Brown, in reply :—

The case of *Cooper* v. *Cooper* (3) in the House of Lords was not cited in *In re Carolan and Scott's Contract* (2). If it had been the decision in the latter case would have been different : *Tench* v. *Glennon* (4), and the judgment there of Palles, C.B.

THE VICE-CHANCELLOR said he would again consider the matter.

June 4.

THE VICE-CHANCELLOR :—

This suit has been brought by the plaintiff as judgment mortgagee, and as executrix of Richard Tevlin, for the recovery of the sum due on such judgment mortgage claiming to be, as such, an assignee of a distributive share of the personal estate of Patrick Gilsenan. There has been no administration of this personal estate, part of which consists of a farm for some time in the possession of the defendant Nicholas Gilsenan. The defence is that the judgment mortgage claimed by the plaintiff did not constitute an assignment of, or a specific charge upon, the farm in question.

An important question has been raised, namely, whether a judgment can be effectually registered under the Judgment Mortgage Act against a portion of the personal estate of a deceased intestate so as to constitute it a specific charge by way of mortgage upon such portion of the personal estate. I had this question before me in the case of *In re Carolan and Scott's Contract* (2) which was a summons under the Vendor and Purchaser Act, 1874, when I was of opinion, and so held, that the right of a next-of-kin

(1) 22 I. L. T. R. 82.
(2) [1899] 1 I. R. 1.
(3) L. R. 7 H. L. 53.
(4) 34 I. L. T. R. 157.

to a share of the personal estate of an intestate, consisting in whole or in part of chattel interests in lands, is not such an estate or interest in the lands as is capable of being attached by a judgment mortgage under the Act; that a judgment mortgage attaches merely on the estate or interest of the judgment debtor in the lands or hereditaments sought to be charged; and that a next-of-kin who is entitled under the Statute of Distributions to a share of the personal estate has not such an estate or interest in the chattels real comprised in the personal estate as would enable a judgment against him to be registered as a mortgage upon it. That case which was decided in May, 1898, was not appealed from. A subsequent case, however, *Tench* v. *Glennon* (1), in which the same question was raised, came before the Lord Chief Baron in a civil-bill appeal on circuit reported in the 34 Irish Law Times Reports, page 157, in which he arrived at an opposite conclusion, and in which he is reported as saying that my decision was distinctly against the case of *Cooper* v. *Cooper* (2) which, as he observes, was not cited before me, and says that it had been before the Court of Appeal in this country, and had been considered in cases as to the right of one or more of the next-of-kin of a deceased intestate, and that they had been held entitled to votes as being in possession as tenants of the leaseholds, which cases he also correctly says were not cited before me. He goes on to say that the judgment of Lord Cairns in *Cooper* v. *Cooper* (2) goes in the fullest manner into the question of the rights and position generally of the next-of-kin of a deceased intestate; that the position of a next-of-kin of a deceased intestate differs completely from the position of a creditor of the intestate; that a next-of-kin has such an estate or interest as he can release, but a creditor of the deceased has not; and he held that the defendant as assignee of the widow had such an estate or interest in the farm in question as a judgment mortgage could be registered against.

I would not presume to differ from any of the propositions laid down by Lord Cairns even if I did not concur in them, and I may add that the House of Lords seem to have quite agreed in these propositions.

(1) 34 I. L. T. R. 157.

(2) L. R. 7. H. L. 53.

V.-C.
1901.
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Gilsenan.

I do, however, venture to differ from the Lord Chief Baron, when he says that my decision was distinctly against the case of *Cooper* v. *Cooper* (1). No such question as that, now before me, was or could be before the House of Lords or Lord Cairns in that case, which was entirely a question of election, namely whether the position of a next-of-kin was such as to raise a case of election, nor were any of the propositions there laid down by Lord Cairns connected with the reasons which led to my decision in the case I have mentioned. My reasons were based upon the terms of the Judgment Mortgage Act, and it is upon these reasons that I have to decide the case now before me.

It is necessary for me to refer briefly to the state of the law of judgments as affecting lands when that Act was passed. Before the Act 3 & 4 Vict. c. 105 (Pigot's Act), judgments were not charges upon the lands of the debtor, and his only relief against freehold lands was by writ of elegit, and against chattels real by writ of *fi. fa.* Pigot's Act, however, gave to judgment creditors a specific lien on all the lands of the judgment debtor, real or personal, whether in possession or reversion, of which the debtor was seized or possessed, or to which he was entitled for any estate or interest, or over which he had any disposing power which he might, without the consent of any other person, exercise for his own benefit. This new system, however, was supposed not to work well, and accordingly the system of judgment mortgages was invented. This was brought in to supersede all the then existing remedies for recovery of judgments out of the lands of the debtor, and it is in reference to this change that I have referred to the state of the law when the Act was passed. In none of these Acts was there any express mention of, or reference to, the shares of next-of-kin under the Statute of Distributions. This would hardly have been so if there was any intention of including *de novo* such shares in the interests in lands of the judgment debtor which it was designed to make liable to his judgment debts. It would appear that the intention of the Act was not to create any new liabilities, but to substitute a new method of enforcing existing liabilities for the existing methods which it was the main object of the Act to abolish.

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(1) L. R. 7. H. L. 53.

The subject matter then would be the existing liabilities, whatever they were. They are to be ascertained from the provisions of Pigot's Act. These refer to and profess to deal only with lands, hereditaments, &c., of or to which the debtor shall at the time of entering up the judgment or at any time afterwards, be seized, possessed or entitled at law or in equity, whether in possession, reversion, remainder or expectancy; or over which such person shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might without the assent of any other person exercise for his own benefit. The remedies which the judgment creditor is given are against the hereditaments charged by virtue of that Act, and only against these hereditaments. They are to be the same as in a Court of Equity he would be entitled to in case the person against whom the judgment shall have been so entered had power to charge *the same hereditaments,* and had by writing under his hand agreed to charge the same with the amount of his judgment debt. The subject matter here dealt with is land, and is dealt with as land. I do not think that by any reasonable intendment it can be held to include such an interest as the next-of-kin are entitled to under the Statute of Distributions. That statute, which deals of course only with personal estate, was passed to remedy the hardship resulting from the exclusive right of the administrator, who was appointed by the Ordinary, to enjoy the residue of the personal estate of a deceased person, after payment of the debts and funeral expenses of the deceased, for his own benefit. It enabled the Ordinary or other Judge of the Spiritual Court to call the administrators to account for the goods of the deceased, and upon hearing and due consideration thereof to order and make just and equal distribution of what remained clear, after deducting debts, expenses, &c., amongst the wife and children, &c.; and to decree and settle and compel the administrators to observe and pay the same by the due course of his Majesty's Ecclesiastical laws. It then prescribed the rules according to which the surplusage of the estates of persons dying intestate were to be distributed by the Ordinaries, and other persons by the Act enabled to make such distribution. It thus appears that the personal estate was there dealt with, not as the property of the next-of-kin in specie, but as a fund to be distributed among them, as there prescribed, such distribution being made if necessary by a Court of competent jurisdiction. The legal estate in chattels real or other chattel interests in lands or hereditaments was in the administrator, by the delegation of the Ordinary, and remained in him, till he made the prescribed distribution of the surplusage. There is no power given to the administrator corresponding to that of an executor, of assenting to the distributive shares of the next-of-kin, instead of which he is bound to distribute the shares himself. Nor is the estate or interest here dealt with an estate or interest which the debtor could dispose of for his own benefit, without the assent of any other person; first, because as I have already said, he could not deal with it at all in specie; and, secondly, because he could not do so without the consent of the administrator. It therefore was not, in my opinion, within the description given by Pigot's Act. If so it is not within the species of hereditaments which the judgment creditor could be entitled to charge under that Act with the amount of the judgment debt, and this was the only remedy which the judgment creditor was entitled to exercise after that Act came into operation.

It remains then to consider whether it comes under the provisions of the Judgment Mortgage Act, which is the question in the case. The judgment debtor here was not seized nor possessed of any lands, tenements, or hereditaments, of any nature or tenure. The words "of any nature or tenure" appear to apply to the lands, &c., and not to the estate or interest of the debtor therein, but either way I cannot hold that this debtor was within the meaning of this Act seized or possessed of the leaseholds of the deceased because he was one of a set of next-of-kin, among whom the administrator was bound to distribute the deceased's estate on his dying intestate. His right was to call upon the administrator to discharge his duty by distributing under the statute the whole of the surplus personal estate, including any leaseholds for years, and he should, if necessary for the distribution, have turned the whole personal estate into money and paid the funeral and testamentary expenses and debts thereout, and then paid their share of the surplusage to the next-of-kin, as prescribed by the Statute of Distributions. No doubt by the consent of all the next-of-kin to take the surplusage in kind, a sale so far might have been avoided.

I remember cases where this was done, but it was only by the consent of all the persons interested. Under the Judgment Mortgage Act no property is charged, except such as was within Pigot's Act.

I am bound to take into consideration the consequences that would follow from adopting the plaintiff's construction of the Act. What was at most an equitable charge, enforceable as such by the ordinary procedure of this Court, would be at once, and *ipso facto*, converted into a legal mortgage of all the lands or hereditaments of the debtor mentioned in the prescribed affidavit, and this too without any knowledge of the transaction by, or any notice thereof to, the debtor. All this was to be effected on his own affidavit, and this affidavit is not required to do more than state the obtaining of the judgment, and that to the best of the knowledge and belief of the deponent, the person against whom such judgment was entered up, was at the time of the swearing of the affidavit seized, or possessed of, or had such disposing power as therein mentioned, over such lands, tenements, or hereditaments. The effect of this *ex parte* proceeding is to transfer to and vest in the creditor registering such affidavit all the lands, tenements, and hereditaments mentioned therein, for all the estate and interest of which the debtor named in the affidavit was at the time of such registration seized or possessed at law or in equity, or might at such time create by virtue of any disposing power, &c., but subject to redemption; and the creditor is to have all such rights, &c., as if an effectual conveyance had been executed to such creditor of all such estate or interest. This is certainly a very strong and drastic measure, but such as it is we are of course bound to accept it and give it its due operation. But beyond this, I feel no obligation to extend it. It would come to this, that every judgment creditor of a next-of-kin, without any distribution or ascertainment of the rights of the next-of-kin, by simply filing an affidavit under the Judgment Mortgage Act, and specifying some particular chattel real selected by himself, which passed as undisposed of to the administrator, and saying that he believes that his debtor is at the time of swearing his affidavit seized or possessed of, or has the required disposing power over, this particular chattel interest, and registering this affidavit, can thereby constitute himself a legal mortgagee of that chattel. Even though he is confined to the estate or interest of the debtor, it would or might interfere most seriously with the administration of the personal estate of the intestate. If it could be done by a creditor of one of the next-of-kin it might equally be done by one or more of the creditors of every next-of-kin of the intestate.

I am not prepared to sanction such a cause of confusion and delay, and I cannot conceive that any such result was contemplated by the Act.

The observations of Lord Cairns in *Cooper* v. *Cooper* (1), cannot fairly be relied on as applying to a totally different case which was not even incidentally mentioned there. The rights and powers of next-of-kin, as to releases or assignments of their interests in any specific portion of the estate of an intestate seem to me to be perfectly consistent with the views I have expressed as to the operation of the statutes relating to judgments.

I have gone with this particularity into my reasons for my decision in *Carolan and Scott's Contract* (2) in order to state the grounds on which my opinion there proceeded, and to show as I have now endeavoured to do, that my decision on that case and in the present are not distinctly or at all against the case of *Cooper* v. *Cooper* (1), or the views of the learned Lords there expressed.

I shall accordingly follow my decision in *Carolan and Scott's Case* (2).

I dismiss the case with costs, so far as it seeks relief grounded on the judgment mortgage.

If the plaintiff can, on other grounds, maintain a claim on the personal estate of the intestate, she is not to be prejudiced by the decision I have now made. Her summons seeks a general administration of the personal estate of the intestate, Patrick Gilsenan, but there was no case made for this, except on foot of the supposed judgment mortgage which I have so disallowed.

Solicitor for the plaintiff: *Callan.*

Solicitor for the defendant Nicholas Gilsenan: *Sullivan.*

D. M'C. M.

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(1) L. R. 7. H. L. 53.

(2) [1899] 1 I. R. 1.

CROSKERY *v.* RITCHIE.

V.-C.
1901.
June 26.

Will—Condition—" Wishing to return and settle in native country"—Condition becoming illusory—Dispensing with performance—Discretion of executors — Executors dead — Trust carried out by Court — Equality equity.

A testator by will left two farms to his son M., and by a codicil he provided that in case of his son R., who was then in New Zealand, wishing to return and to settle in his native country, one of the farms should be given to him by the testator's executors at such time and coupled with such conditions as they might deem expedient. The farms were sold in a suit, under an order which reserved the question of the rights of the parties in respect of the proceeds, and realized £1100 and £400, respectively. The executors were dead. R. had never returned, and was still in New Zealand:—

Held, that the proceeds of the two farms should be divided into two equal parts, and that R. was entitled to be paid one moiety without returning to this country.

Adjourned Summons.

John Ritchie made his will dated the 8th March, 1866, and thereby left all his property to his executors in trust for the purposes thereinafter mentioned: he continued (amongst other provisions) that as he had reason to believe that his sons Thomas and Robert Hutton were already provided for, and able to earn a comfortable support, he considered it unnecessary to leave them any legacy except an acknowledgment of £10 to each: he directed that in the event of his daughters Sarah Anne, Margaret, and Rosina marrying with the approval of his executors, they should each be entitled to £200; he directed that his son Martin Coates should on his attaining the age of twenty-four years get possession of the testator's houses, lands, stock, and crop, subject to the payment of whatever balance might remain (after the moneys at interest should have been exhausted) of the marriage portions above specified; and he appointed his wife and Joseph Perry and George M'Murray executors.

The testator made a codicil dated the 24th December, 1866, as follows:—" Whereas I am not yet fully satisfied of the success and independence of my son Robert Hutton in New Zealand, I will that in case of his wishing to return and settle in his native country, one of my farms, either that in Magheracranmoney or that in Terminane be given to him by my executors at such times and coupled with such conditions, and with amount of stock and crop as my executors may deem expedient."

The testator died in 1871. His widow obtained probate, and died in 1877. The other executors died—one prior to 1881—the other in 1894, without having taken out probate or acted in the trusts.

Martin Ritchie and the widow lived together on the farms until her death, and thenceforth he remained in occupation until his death in 1896.

Robert H. Ritchie had gone to New Zealand previous to the date of the will, and had since remained abroad. So far as appeared, he had been able to earn a competent support there, and had induced his three sisters to emigrate; he had never called upon the executors to give him one of the farms, or made any claim on his brother, or expressed any wish to return or settle in Ireland: he was still in New Zealand.

Sarah Anne Ritchie died without having been married. Margaret Ritchie married a man named Shand in 1893: she had not received any part of her marriage portion. Rosina Ritchie was unmarried.

This was a suit for the administration of the estate of Martin C. Ritchie who had died intestate, the plaintiff being Horatio Croskery, who as a creditor had obtained administration to him—Robert H. Ritchie and Margaret Shand being the defendants.

By the order on further consideration dated the 13th February, 1900, the defendants and Rosina Ritchie so consenting, it was ordered that the interest of the intestate in the farms should be sold free from their claims under the will of John Ritchie, and that the proceeds should be lodged in Court: and the question of the rights of the defendants and Rosina Ritchie under the will in respect of the proceeds of the sales was reserved.

The sales were had and realized £1100 and £400, respectively.

This was an application on the part of the plaintiff that the question of the rights of the defendants and Rosina Ritchie in respects of the proceeds of the sales might be determined.

R. F. Harrison, K.C. (with him *D. M. Wilson*), for the plaintiff :—

The plaintiff does not deny that Margaret Shand is entitled to £200, and that Rosina Ritchie may become entitled to a similar sum. Robert Ritchie, however, has no claim against the sale moneys. The will contains a clear gift of the farms to Martin Ritchie, and the provisions of the codicil are of too vague and uncertain a nature to deprive him of them. The executors are dead, and there is no person to select which of the farms should be given to Robert, even if he now wished to return and settle here: the farms were of very different values, and a division of the proceeds would not comply with the direction in the codicil. Robert, has not, moreover, performed the condition. [Counsel referred to *Jones* d. *Henry* v. *Hancock* (1)].

William M. Jellett, K.C., and *Orpen*, for the defendants and Rosina Ritchie :—

As there are now no executors to exercise the discretion conferred on them by the codicil, the Court should carry out the trust: see *Obert* v. *Barrow* (2), and the judgment there (p. 485) of Cotton, L.J.; and this should be done by dividing the proceeds of the two farms equally between the brothers. The gift in the codicil is as distinct as that in the will. There is no longer any farm on which Robert could reside, and the portion of the condition which deals with settling in this country has become futile and void. As to his returning, the Court would not insist on his doing so before being paid, as he might next day go away again, thereby rendering that part of the condition nugatory.

[They referred to *Maud* v. *Maud* (3)].

(1) 4 Dow, 145.
(2) 35 Ch. D. 472.
(3) 27 Beav. 615.

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Wilson, in reply:—

The condition is a condition precedent, and it could not have been intended that Robert was to have his whole life to perform it: the words of the codicil are in the present tense; the persons to exercise the discretion are the executors, and they should administer the estate within a reasonable time. Robert has elected to remain in New Zealand and not to perform the condition. The doctrine that equality is equity cannot apply here; the property is not definite; the same construction must be given as would have prevailed if there had been no sale; and if the farms had not been sold they could not both have been divided: the testator says *one* of them is to be given to Robert, and the trust cannot be carried out by dividing the proceeds equally.

THE VICE-CHANCELLOR held that the farms should be dealt with separately; that a share of the proceeds of each should go to each of the brothers; that the principle of equality being equity should be adopted; that there was no object in requiring Robert H. Ritchie to return merely for the purpose of receiving his share; and accordingly that the proceeds of the two farms should be equally divided between him and the estate of Martin C. Ritchie.

Solicitors for the plaintiff: *James Murland & Co.*

Solicitors for the defendants and Rosina Ritchie: *Orpen & Sweeny.*

D. M'C. M.

TALBOT, Landlord; HONEYFORD, Tenant (1).

Appeal.
1901.
June 21, 22.

Landlord and tenant—Land Law Acts, 1881-1896—*Fair rent—Buildings erected by tenant in pursuance of covenant in lease—Reduction of rent in consequence—Arrears of rent paid by tenant on obtaining possession of holding—Percentage allowed to tenant in fixing fair rent.*

By lease, dated the 14th September, 1829, the lands of C. in the county of Armagh, containing 87 acres statute measure, were demised to M. for three lives, at the rent of £93. The lease contained a covenant that M. was to lay out a sum of money in the erection of a substantial dwellinghouse, to be built of stone and lime, and a covenant that on its completion the lessor would accept £70 a-year rent instead of £93. The house was built, and the landlord accepted the reduced rent.

In the rental for 1881 the representatives of M. appeared as tenants of the holding; but in that year a change was made, and J. W. Redmond was inserted as tenant of 59a. 2r. 16p., at the rent of £51 a-year, and G. Mears as tenant of 22a. 2r. 16p., at the rent of £23 9*s*. The rent having fallen into arrear, the landlord evicted the holding in 1881, and Redmond's portion was in the landlord's hands, the total amount of the arrears being £277 9*s*., down to September, 1881. It was then agreed that a letting should be made to Collen and Mears, provided they paid the arrears of rent. On the 3rd January, 1882, Mears paid £60 17*s*. 3*d*., and on the 17th March, 1882, Collen paid £216 13*s*., these two sums making together the total amount of the arrears. The names of Collen and Mears were then inserted on the rental, Collen as tenant of 48a. 2r. 11p. at 21*s*. an acre—£51, and Mears as tenant of 34a. 2r. 10p., at 20*s*. an acre—£34 13*s*. The interest of Collen subsequently became vested in H., who served a notice to fix a fair rent:—

Held (1) (affirming the decision of the Land Commission), that the buildings must be presumed to have been erected in pursuance of the covenant in the lease, that they were the landlord's property, and that no deduction was to be made from the rent on account of them; (2) (varying the order of the Land Commission), that no deduction was to be made from what would otherwise be the fair rent of the holding in consequence of the payment made by Collen when he became tenant.

By lease dated the 14th September, 1829, Sir Capel Molyneux demised to Gabriel M'Lean the lands of Cloghan, in the county

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(1) Before **Fitz Gibbon, Walker,** and **Holmes, L.JJ.**

Appeal.
1901.
TALBOT,
Landlord;
HONEYFORD,
Tenant.

of Armagh, containing 87A. 3R. 10P. statute measure for three lives, subject to the rent of £93. The lease contained a covenant by the lessee, his heirs and assigns, "that he should within the space of (1) years from the date of these presents lay out and expend the sum of on building on the lands demised a good and substantial house of lime and stone." It also contained a covenant against alienation or sub-letting without consent in writing of the lessor, and a covenant that the lessee should "within the space of from the date hereof enclose and ditch-in part of the said demised premises, and there implant forest trees, either ash, oak, fir, beech, or sycamore, and that he should and would during the continuance of the demise well and sufficiently keep the said ditched and fenced in, and preserve and keep the said forest trees from being destroyed, or from want of necessary care going to decay, and that he should and would ditch and quick-set all the out-bounds and fences of the said premises." The lease contained a covenant by the lessor that in case the tenant should within the period thereinbefore mentioned "expend the sum of in building on said demised premises a stone and lime house," and also should "within the space of from the date hereof enclose and ditch-in part of the said demised premises, and there implant forest trees," that then the lessor would accept £70 5*s.* in lieu of the yearly rent of £93.

The lessee built a substantial dwelling-house of stone, and also a gate-lodge and out-offices on the premises, to which the landlord contributed some building material. These buildings were stated to have cost £1200, and one of the Sub-Commissioners valued them at the time of his inspection at £750. There was no evidence as to when they were erected, but the landlord had allowed to the tenant the reduction in the rent for a long period of years.

On the 20th July, 1871, James M'Lean assigned the lands to John W. Redmond. In 1881 the holding was evicted for nonpayment of rent, the decree was executed on the 14th June; the amount of arrears then due being £203 1*s.* 3*d.*, down to September, 1880. In September, 1881, another year's rent accrued, amounting

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(1) This and the other blanks occurred in the original instrument.

Appeal.
1901.

Talbot, *Landlord;* Honeyford, *Tenant.*

to £74 9*s.*, making together £277 9*s.* In 1881 the representatives of M'Lean appeared in the rental as tenants of the holding, but the names of J. W. Redmond and George Mears were inserted in their stead, and the holding was divided, 59a. 2r. 16p. being given to Redmond at the rent of £51 a-year, and 22a. 2r. 16p. to Mears at the rent of £23 9*s.* After the eviction the lands were in the landlord's hands, and the lease expired shortly afterwards by the death of the last *cestui que vie.* It was then agreed that a new letting should be made to Collen and Mears upon their paying off the arrears. On the 3rd January, 1882, there was paid £60 17*s.* 3*d.* by Mears, and on the 17th March, 1882, £216 13*s.* by Collen, these two sums making together £277 10*s.* 3*d.*, the total amount of the arrears. Thomas Collen was then entered on the rental as tenant of 48a. 2r. 11p., at 21*s.* an acre—£51, and Mears as tenant of 34a. 2r. 30p., at 20*s.* an acre—£34 13*s.*; Mears had thus got twelve acres added to his farm of 22a. 2r. 16p. The entry in the rent-book of the estate for the years 1880 and 1881, was in the following form:—"No. 9. J. W. Redmond; G. Mears—Representatives of M'Lean—82a. 0r. 32p. Arrears to September, 1880, £203 1*s.* 3*d.* Year's rent September, 1881, £74 9*s.* Date of receipts, 3rd January, 1882—£60 17*s.* 3*d.*; 17th March, 1882—£216 13*s.* Poor-rate, 15*s.* 3*d.*; £2 9*s.* 6*d.*" The interest of Collen subsequently became vested in Honeyford, who served a notice to fix a fair rent. The Sub-Commissioners fixed the fair rent at £51, having deducted £3 a-year for £60 expenditure on fences, and £24 a-year for £600 expended on buildings.

The Land Commission, on re-hearing, before Meredith, J., and Wrench, and the Hon. G. Fitz Gerald, Commissioners, fixed the fair rent at £57, made up of £49 6*s.* 4*d.*, as the yearly value of the land, and £18 15*s.* as the value of the buildings, subject to a deduction of £10 16*s.* 8*d.*, being interest at 5 per cent. on the sum of £216 13*s.*, paid by Collen on getting the holding; but they held that the buildings were the landlord's. On the re-hearing the following judgment was delivered by Meredith, J.:—

When this case was heard before myself, Mr. Commissioner Wrench, and Mr. Commissioner FitzGerald, an important question arose as regards the ownership of the improvements upon the holding. We have carefully considered the entire evidence in the case, documentary and oral, and we have arrived at the conclusion that the tenancy which is now in existence cannot be treated as a restitution of the tenancy under the lease of 14th September, 1829, or of any portion of that tenancy, that the letting which was made to Collins was in law and fact a new letting, and that the tenant, Collins, paid to the landlord an "input" of £216. In our view of the case the tenant is entitled to have that input taken into consideration, and we have taken it into consideration, allowing him 5 per cent. on that sum. The value of the land we estimate as it stands at £49 6*s.* 4*d.* As regards the buildings we consider that the capital value of the buildings, having regard to all the circumstances of the case, the expenses of maintenance and otherwise, is £750, and that they add to the letting value of the holding a sum of £18 15*s.* The gross fair rent of the holding would thus be estimated at £68 1*s.* 4*d.*, and the deduction from that would be £10 16*s.*, leaving the fair rent £57 and a few shillings. We fix the rent at the sum of £57. The case is one in which we think either side should be at liberty to appeal to the Court of Appeal, and we shall give leave accordingly.

The landlord appealed from so much of the order of the Land Commission as allowed to the tenant a deduction of £10 16*s.*, being the interest on the £26 16*s.* paid by Collen as an input, and asking that the fair rent of the holding should be fixed by the Court on the principle that such fair rent should be the gross fair rent of the holding, taking the buildings and other improvements as the property of the landlord, and without making any allowance to the tenant for the sum of £216.

The tenant appealed from the order of the Land Commission on the ground that the ownership of the improvements, including buildings, was allowed to the landlord, instead of the tenant.

Cherry, *K.C.*, and *Wakely*, *K.C.*, for the landlord:—

The tenancy created in 1882 was a new tenancy, and was not a re-instatement of the old tenancy. The lease expired in April, so that there was no tenancy existing in the holding on

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the 22nd August, 1881, and it is not a case in which a tenancy from year to year would arise on the expiration of an "existing lease" within sect. 21 of the Act of 1881.

When the lease expired the possession was not even in the tenant. Moreover, when the tenancy was created in March, 1882, it was created in a person who was neither the original tenant, nor the assignee of such tenant. Section 20, sub-section 2, of the Act of 1881, contemplates the case of a landlord resuming possession from a present tenant, and then the re-instatement of "such tenant." The tenancy in Collen was a new tenancy; the rent was different, the acreage was different, and the amount of rent on the two portions of the holding was fixed at a different rate. The fact of the estate being subject to the Ulster Custom does not make any difference. The custom revived when the landlord demised the holding again: *Lendrum* v. *Deazley* (1).

Even if the tenancy is not to be deemed a new tenancy, the buildings are the property of the landlord; they were erected in pursuance of the covenant in the lease of 1829, and as the landlord had accepted the reduced rent of £70 for a long period, the tenant must be deemed to have received "valuable consideration" for them within the meaning of the Land Act, 1896, section 1, sub-sections (4) and (8).

The payment made by the incoming tenant Collen was not in the nature of a fine, but a discharge of the arrears due by Redmond. It could have been relied on by Redmond if he had been sued for these arrears: *Purcell* v. *Henderson* (2). It cannot therefore be treated as a fine, and the Land Commission were wrong in allowing interest upon it to the tenant. Even if it was a fine, this should not have been done: *Glenny* v. *Bell* (3); *Mollan* v. *Kieran* (4). The case is quite different from *Lanyon* v. *Clinton* (5), where the consideration for which the fine was originally paid failed, and the fine was not returned. Here the money was paid to acquire the rights of a present tenant, which are still enjoyed.

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(1) 4 L. R. Ir. 635.

(2) 16 L. R. Ir. 213, 466.

(3) [1898] 2 Ir. R. 233.

(4) [1894] 2 Ir. R. 27.

(5) [1895] 2 Ir. R. 150.

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Hume, K.C., and *Best*, for the tenant :—

We say that the letting to Collen was a re-instatement of the old tenancy, and that the agreement between the parties was that on payment of the arrears of rent, Collen was to be re-instated in the tenancy of Redmond. Even if the transaction did not amount to that, then it was a purchase of a right to fix a fair rent; that is, applying the purchase, not to the tenancy in the holding, but to a single incident attached to that tenancy: *Caldwell* v. *Houston* (1); *Ball* v. *Downshire* (2).

Improvements effected by a tenant in pursuance of a covenant in a lease do not become the landlord's property for the purpose of having rent assessed on them: *Hunter* v. *Coey* (3). Such works are, to the extent covenanted for, to be taken as done under the lease: *Mullin* v. *Lavens* (4).

June 22.

FITZ GIBBON, L.J. :—

This case involves considerable difficulty in understanding, not so much the law as the dealings to which the law must be applied. But when those dealings are understood, I do not think that the rights of the parties will be found to be exceptional or extraordinary. This is a limited appeal—the power of limiting an appeal has been given to the Land Commission—and the question left to us to determine is—"Whether, upon the evidence, the principle upon which the Court acted in fixing the fair rent of the holding, as stated in their judgment, was correct." The points in controversy are two. First, whether the sum of £216 13*s*. which was paid by the predecessor in title of the existing tenant, when that predecessor became tenant of the holding, was a sum in respect of which deduction should be made from what would otherwise be the fair rent? The general or abstract question has not been discussed—whether the payment of such a sum of money is or is not one of "the circumstances of the holding" which should or might be taken into consideration by the Land Commission in fixing the fair rent. What the Land Commission decided, and what the parties have discussed here, was the specific and definite question whether the payment was one which could, on legal principles, be made the ground of a specific allowance of £5 per cent. per annum upon the whole sum paid. The Land Commission have treated the money as being an "input" by the tenant. In my opinion, a fixed and perpetual deduction from the rent of a holding, by way of percentage upon money paid by an incoming tenant to a landlord, can be made only where the payment is a purchase *pro tanto*, an investment, or a fine, whereby, and in consideration whereof, the tenant buys or acquires from the landlord a share or portion of, or an interest in, the fee and inheritance of the landlord. When this has occurred, such interest cannot again be made the subject of assessment for rent, to be paid to the landlord who has been paid for it. That is the only sense in which I can understand the word "input," where it is made the ground for a permanent annual deduction from what would otherwise be payable to the landlord as the fair rent of the holding. This £216 13*s.*, in my opinion, was not in fact paid in that way.

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(1) 24 I. L. T. R. 25.

(2) *Ibid.* 28.

(3) 24 I. L. T. R. 55.

(4) 16 I. L. T. R. 13.

The second question relates to the buildings, which are "improvements." The holding, as regards buildings, is not an ordinary farm. It has upon it an exceptionally valuable set of buildings, including a good dwelling-house, a gate-lodge, and substantial out-offices. These were at one time valued at £1200; one of the Sub-Commissioners valued them at £750; and at every step in the transaction, the value of the buildings has been a large item in the value of the holding. But the landlord says that they were built in performance of a covenant by the tenant contained in the lease of 1829, for which the landlord agreed to give, and the tenant got, a reduction of £20 per annum in his rent for the term of the lease. It is clear that any buildings erected in performance of such a covenant as that, were built in pursuance of a contract for valuable consideration, and the enjoyment of the demised premises at the reduced rent must be taken as compensating the tenant for his expenditure. He did the stipulated work, and he got the stipulated value for it, in the deduction of the agreed £20 per annum from the rent during the demise.

The principles applicable to both these questions are not different in the case of an Ulster tenant from what they are in any other part of Ireland, because they depend on facts and on

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contract, and the contract of tenancy must govern the Ulster tenant as well as any other tenant.

The first point turns on ascertaining what were the terms, in fact, upon which the predecessor of the present tenant paid the £216 13*s*. Honeyford is the successor of Collen, who paid the money, and whatever rights Collen had Honeyford has now, but no more. The holding was evicted in 1881, and the lease expired shortly after. On reading the oral evidence, we thought we understood what the landlord and tenant meant. But to-day, finding some confusion in the evidence, we got the rent-book, and found in it a contemporaneous and manifestly honest record of the dealing. The book is, in fact, a written memorandum of the way in which Collen became tenant, and as such we are entitled to rely upon it. It fully clears up the oral evidence. The place was let in 1829—80 odd acres—to a single tenant at the rent of £74 9*s*. The representatives of M'Lean, the lessee, appeared as tenants at No. 9, in the rental of 1881, and the names of J. W. Redmond and George Mears were inserted in their stead. The holding was divided, 59A. 2R. 16P. being given to Redmond, and 22A. 2R. 16P. to Mears. The rent reserved by the lease was also divided, £51 being made payable by Redmond, and £23 9*s*. by Mears. There were arrears due to September, 1880, amounting to £203 1*s*. 3*d*. and a further year's rent accrued due to September, 1881, amounting to £74 9*s*.; it was entered as accruing upon the letting to both Redmond and Mears, though there had been an ejectment for non-payment of rent, and the place had been evicted, and was in the landlord's hands.

The lease had expired before the eviction, so that when this entry was made the lease was gone, both by eviction and by efflux of time; there was then, notwithstanding the entries, no legal tenancy in the lands, and Redmond's part was in the landlord's own possession. Then there appears in the rent-book a subsequent entry—"settlement of rent and arrears"—two payments are acknowledged, which discharge to the last penny all the "arrears" then due, viz. "Jan. 3, 1882—£60 17*s*. 3*d*., and March 17, 1882—£216 13*s*.," totting together to £277 10*s*. 3*d*., the exact amount of arrears to September, 1881, allowing for some poor-rate entered in the appropriate column. What happened was this—Mears,

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who was tenant of an adjoining farm, got an addition of some twelve acres, and the rest was let to Collen; but on the terms that, between them, they should pay the arrears of rent due under the lease and the overholding tenancy which arose on its expiration. This is recorded in the margin—"Thomas Collen, 48A. 2R. 11P., at 21*s*.—£51. Mears, 34A. 2R. 30P., at 20*s*.—£34 13*s*. 10*d*."; the acreage of Mears is made up by adding to the 22A. 2R. 16P. the 12 acres which were taken from Redmond's 59A. 2R. 16P. The small discrepancy of measurement is accounted for by some allowance for a road.

What was the meaning of that transaction? It appears clear to us that the parties intended to make a new division of the holding as it stood, treating it as a still subsisting tenancy, but giving part of it to Collen, to be held on the same terms on which Redmond had held it. In point of law, this was a new letting. The parties were different; the acreage of the two parts was altered; the lease had been evicted; and even the rent was changed a little, for 21*s*. an acre was put on one part, and 20*s*. an acre on the other. We must hold that Collen was a new tenant coming into a new holding. But the question remains—What were the terms of his contract of tenancy? It is our clear conclusion from the evidence—oral and documentary—that he and the landlord agreed that, on paying the arrears of rent due by the old tenant, he should "step into the shoes" of the old tenant. He was not a continuing tenant, he was not a successor in estate of the old tenant; but he was a new tenant who was to hold on the same terms as the old tenant, in consideration of paying the arrears of rent which were due by the old tenant.

How was this carried out? By a judicial agreement fixing the rent at £51, making him a judicial tenant at that rent. We have not been permitted, by the limited terms of the appeal, to consider those portions of the notice which question the validity of this judicial agreement, as a legal fixing of a fair rent under the Land Law Acts. Since the Act of 1896, I do not know that such questions would be material. But we are satisfied that the dealing was an ordinary Ulster transaction, by which a tenancy subject to an arrear of rent was divided, and it was agreed that each of the new tenants should hold his own part on the terms of the old tenancy, including the term of paying the old rent, upon payment of the old tenant's arrears of rent as such.

Let us apply this to the question about the £216 13*s*. In the case of an Ulster tenancy, where a tenant got into arrear, if the tenancy was sold, the landlord got the arrears out of the purchase-money; but to suggest that the payment of them to the landlord could give the purchaser a claim to a reduction of rent would be a manifest double credit against the landlord. The purchase-money, out of which the arrears would come, must be the price of the good-will of the outgoing tenant *at the old rent*, and can give no right to reduce that rent, nor be the foundation of any deduction from it. If the landlord, after the entries which I have read were made in the rental, had sued Redmond for the arrears, the entries would have proved satisfaction of them as one of the terms of the letting under which Collen became a judicial tenant at the old rent. On the other hand, no allowance or deduction could be made from what would otherwise be the fair rent, in respect of the payment of the £216 13*s*., by which Collen paid the arrears that were due up to September, 1881. It was not a fine. It was a payment of Redmond's debt. We shall make our decision clear by putting into our order that "the Court doth declare upon the evidence that the sum of £216 13*s*. was paid by Thomas Collen, the predecessor in title of the tenant, upon the terms that the payment should be taken in discharge of arrears of rent due by John W. Redmond, the previous tenant of the holding, and that the said Thomas Collen should have the same rights in respect of his tenancy as if the tenancy of the said John W. Redmond had been transferred to him, and therefore that no allowance or deduction from what would otherwise be the fair rent of the holding should be allowed in respect thereof."

Upon the second question as to the improvements, Mr. Hume contended that an absolute presumption should be made in favour of his client. This is not so. The Ulster custom is always controlled, not only by the actual bargain of the parties, but by the ordinary inferences from the dealings in the particular case. If an Ulster landlord at his own expense builds a house for his tenant, and thereby increases the letting value of the holding, there can be no "custom" that he shall get nothing for it. Whatever addition or improvement a landlord makes upon a holding, is, *prima facie*, a rent-producing factor for him in Ulster as it is anywhere else. The same conclusion must follow when he has paid the tenant, or has compensated him under a contract for valuable consideration, for the improvement in question.

The effect of leaving the blanks which appear in the lease is not to wipe out the covenants in which they occur: they must be carried out according to their terms. The tenant's covenant here bound him to expend £ on building on the lands a good and substantial house of lime and stone; and the landlord covenanted, in return, that when the tenant erected the buildings, the reduced rent of £70 should be accepted instead of £93. Neither party has proved when the buildings now on the holding were erected, and we cannot now say positively whether any or all of them were erected in pursuance of the covenant; but a strong presumption arises from the dealings of the parties that the tenant performed his covenant at or very soon after the execution of the lease, by erecting buildings which satisfied the covenant, because the landlord allowed the reduction; which presumably would not have been allowed if the tenant had not made the improvements which he contracted to make. It appears that the landlord supplied building materials, which he was not bound to give, and if we try to see what the rights of the parties were from what they did, the conclusion is almost irresistible that all that was done on this holding at or about the date of the lease was done in pursuance of the tenant's covenant. Proof of the erection by the tenant of buildings in excess of those required to satisfy the covenant, at a later date, and after the reduction of the rent had been allowed, might show such buildings to be outside the consideration of the covenant. But no such proof has been given, at least as yet, and we can only declare that all buildings and improvements which were executed on the holding in pursuance and execution of the covenants for building and improvement contained in the lease dated the 14th September, 1829, were improvements coming within the Land Law (Ireland) Act, 1896, section 1, sub-section 4, and accordingly that the tenant shall be deemed to have been fully paid or compensated for the same, as having been improvements made by him in pursuance of a contract entered into for valuable consideration.

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With these declarations, the case must go back to the Land Commission.

WALKER, L.J.:—

I concur, and I have nothing to add. As to the question, if a tenant pays an "input" to the landlord for the purpose of getting a tenancy in a holding, he would be entitled to get an allowance for that in the fixing of a fair rent, I express no opinion on that net question until it arises.

HOLMES, L.J.:—

During the greater part of the argument, I thought that the only inference I was at liberty to draw from the evidence was that which I understand was adopted by Mr. Justice Meredith, that the tenancy created in Collen in 1882 was wholly unconnected in both fact and law with the tenancy that had been evicted, and was therefore to be regarded quite apart from the previous letting of the holding. In such case the questions arising in the appeal would depend upon what was the consideration for the sum of £216 paid by Collen to the landlord when he became tenant.

I certainly could not have held, as we are asked to do by Mr. Hume, that it was the consideration for buildings and improvements worth at the least £800. At the same time I am not sure that I should have taken the same view as the Land Commission; but it is unnecessary to consider this, because before the argument ended a rental was produced showing by contemporaneous entries that the intention of both the landlord and Collen was that the latter should as far as possible be placed in the same position and have the same rights as regards the premises let to him which the tenant under the lease would have had if it had not been evicted, and that this was carried out by giving Collen a statutory term. It was for this that Collen paid the money, calculated as being the amount of the rent due by the old tenant, and accepted by the landlord in discharge of such rent. Collen therefore having received the full consideration for what he paid, that sum cannot be taken into account in fixing the fair rent. As regards improvements,

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the present tenant stands in the same position as the lessee would have done if he had continued, after its expiration, tenant under the 21st section of the Act of 1881.

A substantial portion of the improvements was made in pursuance of covenants in the lease of 1829, and compensated for by a reduction of the rent in the manner provided for therein. It is clear that under the 1st section of the Act of 1896, the tenant can get no allowance in respect of these improvements; but if there are other tenants' improvements in the holding, they are to be dealt with in the usual way.

Solicitors for the landlord: *W. R. Meredith & Son.*
Solicitors for the tenant: *Best & Best.*

R. D. M.

BARTON, Grantor; FISHER, Grantee (1).

Appeal.
1900.
Nov. 22, 23.

Landlord and tenant—Land Law Acts, 1881–1896—*Residential holding—Fee-farm grant made before* 1860—*"Though purporting to create the relation of landlord and tenant"—"Full agricultural rent"—Demesne lands.*

By a deed, executed in the year 1801, A granted, demised, set, and to farm let to his son-in-law B, his heirs and assigns for ever, the demesne, house, orchards, and garden of K, subject to a rent, which was secured by powers of entry and distress. There was a proviso that possession of the premises should not be given to B during the life of A, and a covenant by B to pay the rent. The description of the premises given in the deed, and in other documentary evidence, showed that the premises were residential in character at the date of the deed, though since much dilapidated and deteriorated:—

Held, by the Court of Appeal (reversing the decision of the Irish Land Commission), that the premises were let to be used as a residence, and that the holding was excluded from the Land Law Acts.

Query—Whether the deed of 1801 purported to create the relation of landlord and tenant.

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(1) Before Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L. JJ.

Appeal.
1900.

BARTON, *Grantor;* FISHER, *Grantee.*

APPEAL by the grantor from the judgment of the Irish Land Commission, dated 1st June, 1900, affirming the decision of the Assistant Commissioners who fixed a fair rent upon the holding.

The holding consisted of 77A. 3R. 3P., situated on the seashore in the county of Donegal, about nine and a-half miles from the town of Donegal. It was held under a deed, dated January 8, 1801, and made between Thomas Nesbitt of the one part, and John Major of the other part, whereby the premises therein described as the demesne, house, orchards, garden and lands of Kilmacreddan, and also the warehouse or storehouse, in the town of the Port, and the waste ground on south side of the warehouse known as "the oil yard," were demised, granted, set and to farm let to the said John Major, his heirs and assigns, from the 1st day of November then last past, for ever at the yearly rent of £80 5*s*., that is to say, £74 5*s*. for the said house and demesne lands of Kilmacreddan, and £6 for the warehouse—payable half yearly on every 1st May and 1st November during the continuance of the said demise.

The deed contained a power of entry and distress if the said yearly rent was in arrear for twenty-one days; a proviso that the said John Major, his heirs and assigns, were not to have possession of the premises aforesaid except the warehouse, until the death of the said Thomas Nesbitt, or such other period sooner as the said Thomas Nesbitt should think fit and proper to give up the said house and demesne lands to the said John Major, his heirs or assigns; a covenant that the rent should not commence until the possession had been delivered up to the said John Major; a covenant by John Major for the payment of the yearly rent; and a covenant for quiet enjoyment. The deed was described by an indorsement on its back as a "lease."

The actual language of this deed describing the parties and the premises was much relied on in the argument, and with other portions of the deed will be found quoted *verbatim* in the judgments.

John Major married a daughter of Thomas Nesbitt, who survived her first husband and subsequently married William Keane. She became possessed of the grantee's interest in the premises, but how or under what circumstances did not appear. However, her interest in the premises was sold in the Landed Estates Court, in

1869, on the petition of a mortgagee, to Edward Lanigan of Dromahair, in the county of Leitrim, a farmer, for £1000. In the map on this conveyance were shown a good deal of timber and a gate-lodge. On 5th July, 1870, Edward Lanigan, who was stated to have purchased the place for the present tenant, assigned his interest in the premises for £1000 to the present tenant, who was in the assignment described as "of Kilmacreddan, in the county of Donegal, farmer."

It appeared from the evidence adduced as to the character of the holding that at the date of the rehearing before the Land Commission, there was an old three storied house on the holding, containing ten or eleven rooms, which had been allowed to fall into a dilapidated condition. The outhouses, according to the schedule of the Assistant Commissioners, consisted of stalls, potato-house, with barn overhead, byre, calf-sheds, cart-sheds and piggery, and the walls of an oil store. The house, according to the report of the Assistant Commissioners, was in a precarious condition, the flooring and timber decayed, the ceilings and plaster breaking off, and the roof in bad order, although the present tenant had spent a considerable sum in repairing the roof. The out-offices showed no deterioration beyond what should be attributed to the wear and tear of almost one hundred years.

The Assistant Commissioners assessed the buildings as they stood at the capital sum of £230, and the deterioration, owing to neglect since 1801, at £180. There were about eight acres of scrub on the holding, but there was no statement as to the existence of any orchard or garden, or timber. As to the treatment of the holding the report stated "a good deal of useful drainage has been accomplished one time or another, and land formerly bog and scrub has been broken in, and is now occasionally tilled. The farm, taken as a whole, is badly used, and consistently neglected. Whins are taking possession of useful land; several fields have been laid out without any grass seeds whatever, and can only be pronounced as now in a disgraceful mess. Docks, thistles, ragweed, &c. abound, and enjoy perfect immunity from attack. Field after field requires thorough draining. No principle or system of agriculture can be discovered, but exhaustion and ignorance reveal their presence on every side."

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The Sub-Commission fixed the fair rent at £50 1*s*. 1*d*., the old rent having been £65 18*s*. 9*d*., the amount mentioned in the deed of January 8, 1801, having been reduced on the occasion of portion of the land therein comprised being compulsorily acquired by a Railway Company for the purposes of their undertaking.

The grantor appealed from this decision to the Irish Land Commission, and on the rehearing submitted that the lands were demesne lands, and had been preserved as demesne lands, and also that the deed of January 8, 1801, did not purport to create the relation of landlord and tenant. The Irish Land Commission held that the frame and language of the deed pointed to an intention to create the relation of landlord and tenant, and that the lands were not demesne lands, and affirmed the decision of the Sub-Commission.

The grantor appealed to the Court of Appeal.

Matheson, Q.C., and *T. Henry Maxwell*, for the appellant:—

This deed does not purport to create the relation of landlord and tenant: it is therefore not within section 14 (*b*) of the Land Law Act of 1896: *Kelly* v. *Rattey* (1). It is impossible to say that persons intending to create the relation of landlord and tenant would have provided that possession of the holding was not to pass on the execution of the instrument of letting. There is no covenant to repair. The deed is really in the nature of a family settlement, and the main object of the letting was for a residence, section 5 (1) (*a*). The description of the premises shows that this is a residential holding or a demesne.

[Fitz Gibbon L.J., referred to *Bland* v. *Thomson* (2).]

Wylie, Q.C., and *A. Todd*, for the respondent:—

The deed plainly purports to create the relation of landlord and tenant, and would do so but for its date: it is called "a lease" by the parties to it: it uses the apt words "demise," "set," "and to farm let"; it contains a covenant to pay rent. The user of the holding is agricultural: the present tenant is a farmer: the place has long been used as a farm. The absence of a covenant to repair or keep in repair shows there was no intention to preserve it as a demesne or residence: *Mansfield* v. *Congreve* (1); *Graydon* v. *Trustees of Morgan's Charity* (2).

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(1) 32 L. R. Ir. 445.

(2) 32 Ir. L. T. R. 167.

Cur. adv. vult.

Lord Ashbourne, C.:—

Nov. 23.

The Sub-Commission fixed a fair rent upon the lands of Kilmacreddan which form the subject-matter of this appeal, and the order of the Sub-Commission was affirmed by the Land Commission, whose decision is now challenged before us by Colonel Barton, who is entitled to the rent issuing out of these lands. The "holding"—if that is the way to describe it—came into existence under and by virtue of a deed dated January 8, 1801, and made between "Thomas Nesbitt of Kilmacreddan, Esquire," of the one part, and "John Major of Ballyshannon, Esquire," of the other part. By this deed Thomas Nesbitt, in consideration of the love and affection he bore to his son-in-law the said John Major, as well as of the rent thereby reserved, demised, granted, set, and to farm let unto the said John Major "all that and those the demesne, house, orchards, garden and lands of Kilmacreddan, containing by estimation 49a. 2r. plantation measure, as by the map thereof hereunto annexed may appear." We have had an opportunity of seeing the original deed, and there is now no map annexed to it. There may have been one originally attached to the deed, but, if so, it has disappeared. The parcels in the deed also include "all the woods, underwoods, timber, and other trees now standing or growing thereon," and "all the offices, houses, buildings, and improvements"; and the demise is expressed to be "in as full, ample, and beneficial manner as the same is now enjoyed and possessed by the said Thomas Nesbitt." The parcels also comprise "a warehouse in the town of Port," but these premises have nothing to say to the argument, and by common consent have been very properly left out of the case. The *habendum* is to John Major, his heirs, and assigns, for ever. The deed reserves one rent for both sets of premises, but it states that of this rent the sum of £74 5*s*. sterling, yearly, is "for the said house and demesne lands of Kilmacreddan, . . . and the sum of £6 sterling, yearly, is for the warehouse." Next we have the usual powers of distress and entry followed by the remarkable provision "that the said John Major, his heirs, and assigns, are not to have the possession of the premises aforesaid during the life of him the said Thomas Nesbitt save and except the said warehouse . . . until after the death of the said Thomas Nesbitt or such other period sooner as he the said Thomas Nesbitt shall think fit or proper to give up the said house and demesne lands to the said John Major, his heirs, and assigns, . . . and John Major shall not be subject to the payment of any rent for the premises until . . . after he shall be put into the actual possession of the said premises after the death of Thomas Nesbitt or such other time as the said Thomas Nesbitt may think proper during his lifetime to deliver up the possession thereof to the said John Major."

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(1) [1895] 2 I. R. 425.

(2) *Ibid.* 513.

This deed contains its own story, stamped on its face, apparent without any reading between the lines. It was a deed of family arrangement, handing over—in one sense, *in præsenti*, in another sense, *in futuro*—the family residence of the father-in-law to the son-in-law. The transaction was one between members of the same family, though by the lapse of time and the subsequent dealings, the respective interests of the parties to the deed are now vested in persons who are strangers to each other—Colonel Barton being the owner of the rent, and Fisher being the owner of the land liable to the rent.

A glance at the map attached to the Landed Estates Court conveyance made in 1869, shows that at that time, at least, this place was suitable for a family home and residence. From the map we see that a good deal of timber and ornamental planting was upon the lands, and that there was a gate-lodge at the entrance from the road. This map thus corroborates the description of the premises which is given in the deed of 1801.

The character of the premises described as "the demesne, house, orchards, garden, and lands of Kilmacreddan," the timber, the gate-lodge; the position of the parties to the deed being such that they were described as "Esquires"; the fact that the grantor was dealing with the very house in which he resided; that he was giving it to a person to whom his own daughter was married; that the rent reserved was not equivalent to the full value of the house and lands; that the grantor reserved to himself the right to live on the premises during his life or until he should choose to give up the house to make a residence for his married daughter—all these circumstances show that the main object of the parties to this deed was on the one hand to confer, and on the other hand to secure the possession of, Kilmacreddan House and demesne as a residence, in other words "the main object of the letting was for a residence" within the meaning of the 5th section of the Land Law Act of 1896.

The argument before the Land Commission embraced a wider range of topics than we have to deal with. The landlord's counsel argued in the Court below that the lands were excluded from the Acts as being demesne. This contention was only slightly put forward here. But both in this Court and in the Land Commission the landlord's case was mainly rested on the view that this deed did not create nor purport to create the relation of landlord and tenant, and that therefore the lands therein comprised did not come within the scope of the Land Law Acts. Mr. Wylie and Mr. Todd for the tenant strongly urged that by its terms this document—described on its own back as a "lease"—did purport to create the relation of landlord and tenant, and that if it so purported on its true construction, we had nothing to do with what its legal effect might have been owing to the date of its execution, but that it came within section 14 (*b*) of the Act of 1896, and therefore the holding came within the Redemption of Rent Act, 1891, as amended by that section. This argument involved some nice legal considerations, and while it was proceeding it occurred to some members of the Bench that the facts of the case very much resembled those of *Bland* v. *Thompson* (1), and that the application of the tenant should be dismissed on the ground that this land was conveyed by this deed with the main object of providing and securing a residence. In that case the Court were asked to discuss the question which has been presented to us upon the construction of this deed, but they refused, saying that the facts showed that the main object of the letting was for a residence, and that therefore the case was outside the Land Law Acts. I say in this case exactly the same thing. The circumstances of the case show that this was a residential holding. The landlord is therefore entitled to succeed, and the appeal must be allowed. But I offer no opinion on the question whether, if these premises were not intended mainly for a residence, the terms of the deed of 1801 would entitle the tenant to come within the Redemption of Rent Act, 1891, under the terms of section 14 (*b*) of the Act of 1896.

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(1) 32 I. L. T. R. 167.

FITZ GIBBON, L.J.:—

The provisions of two sections of the Act of 1896, sections 5 (1) (*a*) and 14 (*b*), have been discussed before us, but I base my decision on section 5 alone, and I am not to be taken as expressing any final opinion as to the effect of section 14, or as to whether the deed of 1801 was an "instrument purporting to create the relation of landlord and tenant" within the meaning of that section.

Section 5 says: "The Land Law Acts shall not apply to a tenancy in any holding . . . the main object of the letting of which was for a residence." The inquiry—What is the object of a letting? raises a question of fact of the same character as that with which we have frequently had to deal in cases of lettings "for the purpose of pasture." In determining this question we must look first at the contract; and, if it be silent or ambiguous, then at the subject-matter, the acts of the parties, extrinsic evidence, and all material circumstances, with the view of ascertaining the object or purpose of the letting. All these in the present case lead me irresistibly to the conclusion that what was mainly, if not wholly, in the minds of the parties who executed the deed of 1801 was that Kilmacreddan House, with the lands occupied therewith, should continue to be, as it then was, a family residence.

First, take the deed. It shows that Thomas Nesbitt, the grantor, was living at Kilmacreddan, the suitable and comfortable

Fitz Gibbon, L.J.

family residence upon his estate. The deed refers to a map which, if it ever existed, has disappeared. But the map upon the Landed Estates Court Conveyance of 1869 shows that, even then, at least one-third of the land occupied with the house was not ordinary agricultural land, but was ornamental or accommodation land, belonging to the residence. The parcels in the deed of 1801 correspond with the representation given by this map of 1869. Each of the parties to the deed of 1801, the owner and head of the house, and his son-in-law, is therein-described as "esquire." The consideration is the natural love and affection of the father-in-law for the son-in-law, as well as the rent and covenants. By the deed the father-in-law conveys his family residence to the son-in-law, not immediately nor so as to pass the possession forthwith, but on the terms of suspending the operation of the deed—both as regards the rent and the enjoyment of the premises—until such time as the grantor should either die, or should choose to leave the place. The whole scope of the deed was that of a family arrangement, *inter vivos,* based upon love and affection, for the purpose of passing the family residence to the next generation whenever the then owner should cease to occupy it. It is really the case, of all which have come before us, in which the object, which the Land Law Acts afterwards made it necessary to ascertain, most clearly appears upon the face of a contract, executed at a time when no one could have anticipated the importance of disclosing its purpose.

This object is also shown by the negative evidence afforded by what the deed does not contain. This is the first case in my experience in which a person has been brought within the Land Law Acts whose title-deed enabled him to do what he pleased with the holding, and did not impose the primary obligation of a tenant upon him with respect to maintaining the property. The object of the grantor was *quasi* testamentary: he desired to retain the personal enjoyment of the place until his death, or until he might chose to abdicate in favour of his daughter's husband. It was therefore natural for him to impose no obligation of maintenance or repair upon his successors. He did not treat the member of the family to whom he gave the family residence as a tenant, and he therefore imposed no obligation of repair or maintenance upon him. The only obligation on the grantee was to pay the rent. This rent, be it observed, was assessed both on the land and on the house. We must conclude either that the "love and affection" declared by the deed was valueless, or that the rent reserved was not the full letting value at the time. Here a strange anomaly is presented. The Land Commission had no jurisdiction under the Redemption of Rent Act, 1891, unless the rent was "a full agricultural rent" at the date of the application. Both house and lands were the grantor's property, and the rent must be calculated upon both. The valuer's report contains a story of dilapidation and deterioration by the tenant which I have not seen equalled in any other case. In some cases originating notices have been dismissed for less. This in itself ought, in my opinion, to have suggested that the absence of the relation of landlord and tenant might account for a condition of things which could not have occurred with impunity, if the grantor had had the ordinary remedies or powers of a landlord. Yet, notwithstanding the tale of wilful and culpable waste given by the valuer, the "fair rent" was fixed at about one-third less than the rent which was reserved by the family deed of 1801.

Though I do not base my judgment on section 14 (*b*), it is right for me to say that I should find it difficult to hold that the deed of 1801 "purported to create the relation of landlord and tenant." I am much impressed by the arguments of the counsel for the appellant upon the absence of the obligation of maintaining the premises in tenantable repair. It is possible to create a rentcharge, or to make a contract for the occupation of land, which will not "create the relation of landlord and tenant"; and, as at present advised, I do not think that such a dealing will come within the Act of 1896, section 14 (*b*). That section was evidently intended to affect certain decisions of this Court, of which *Kelly* v. *Rattey* (1) was the first. In those cases, the lessees or grantees were excluded because their deeds had been executed before the Act of 1860. I doubt that it is enough for the grantee now to show that the Act of 1860 would apply if his deed were subsequent to its date. The Act of 1896 seems to require that the instrument itself should *purport* to create the relation of landlord and tenant, though by the law existing at its date it could not do so. As at present advised, there seems to me to be a great deal in the argument that this deed of 1801 did not purport to create that relation, but was, in purport and effect, a conveyance of the land in consideration of natural love and affection and of a rentcharge. If so it would, apparently, not be within section 14 (*b*). I make these observations, however, not as the ground of my decision, but lest this case should be treated as ruling a question which we do not decide.

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(1) 32 L. R. Ir. 445.

I may add that, if we compare the facts of this case with those of *Bland* v. *Thompson* (1), the object of letting for a residence is much more plainly shown here than it was there, at least on the side of the grantor. In *Thompson's Case* (1) the land was taken for a residence which was afterwards erected by the grantees; and all the timber belonged to them: here the residence was in existence, and it was conveyed with the object of continuing its use as such. In *Thompson's Case* (1) the grantees paid a fine, and also went under a substantial rent, and there was nothing to suggest that the grantors did not receive full value for the grant: here there was no fine, and the consideration included natural love and affection as well as the rent.

Our order must follow the words of section 5—"It appearing that the main object of the letting of the holding was for a residence," dismiss the originating notice, with costs here and below.

Walker, L.J.:—

I concur in the result arrived at. The question is whether the main object of the transaction in 1801, was to provide a residence. We must decide this question not by the state of things when Fisher's title was acquired, but by looking back to the circumstances when the deed of 1801 was executed. This the Act of 1896 binds us to do. Here the evidence—I need not go through it—shows that the object of the parties was to give and to take this place as a residence. But the main question discussed before us was whether the terms of the deed of 1801 purported to create the relation of landlord and tenant, and thus brought the holding within the scope of section 14 (*b*) of the Land Law Act of 1896. I do not express any opinion on this branch of the argument.

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(1) 32 I. L. T. R. 167.

HOLMES, L. J. :—

The deed of 1801, which is the grantee's root of title, is peculiar. The parties to it are a gentleman of property named Nesbitt and his son-in-law. The former resided on his estates in county Donegal and lived in a house which was suited to a person in his position, with gardens, orchard, and a demesne of about eighty statute acres. The demesne and house together with a store in a neighbouring cottage, were granted by the deed to the son-in-law and his heirs, subject to a yearly rent. It was, however, provided that although possession of the store was given at once, the grantor was to be at liberty to occupy the remainder of the premises during his life, and that the rent was not to become payable until the grantee obtained possession. The deed as the law stood did not create the relation of landlord and tenant; and it is difficult to believe that it was intended to do so. There are no exceptions or reservations, nor are there the covenants usually found in a lease where the premises demised consist of buildings or ornamental grounds.

The deed resembles rather a post-nuptial settlement in favour of the son-in-law, reserving to the settlor a life interest to and a perpetual rentcharge after his death.

Still the test is not what the parties intended, but what the document purports to do; and I am not prepared to hold, where the words of conveyance are "demise, grant, set, and to farm let," where there is a reddendum in the usual form, where there is a covenant to pay the rent, and where the endorsement on the instrument describes it as a lease, that it does not purport to create the relation of landlord and tenant. I leave this issue for further consideration when a similar case arises in which it will be necessary to decide it.

I am not obliged to do so now, as the present appeal can be disposed of on other grounds. I have no doubt that the object of the grant was to provide a residence for the grantor's daughter and her husband. The whole transaction is inconsistent with a letting for pastoral or agricultural purposes. Even fifty years after the deed, and when the grantee's family had suffered vicissitudes of fortune, the map on the Landed Estates Court conveyance shows that one-third of the land was under plantation and unsuited for cultivation.

Before the Land Law (Ireland) Act, 1896, I might have had some difficulty on this point. Fitz Gibbon, L.J., pointed out in *Moonan* v. *Conyngham* (1) that the question under the former law was whether the character of the holding was residential or "agricultural or pastoral." The last Act recognises that the main object of letting even an agricultural or pastoral holding may be for a residence; and in such case the holding is excluded. I am of opinion that this was the object of the grant of 1801; and I agree with Walker, L.J., that if the object existed at that time, it is immaterial how the character of the holding has been since altered through the poverty, the negligence, or the caprice of successive occupants.

Solicitors for grantor: *Dane & Todd.*
Solicitor for the grantee: *Todd.*

G. Y. D.

(1) [1895] 2 I. R. 1.

COPE *v.* BRESLIN.

V. C.
1900.
June 26.

(1897. No. 786.)

Executor—Administration—Sale of mortgaged premises—Proceeds insufficient to meet mortgage debt—Costs of sale.

Portion of an estate which was being administered consisted of five houses, four of which were furnished. The premises were subject to a mortgage, and the mortgagees applied for leave to sell in the Land Judge's Court. The Vice-Chancellor, however, directed the executor to sell, and retained the sale in his own Court. A considerable saving in costs was thereby effected, and the proceeds of the sale were further enhanced by the houses being sold with the furniture, as a going concern.

The mortgagees having applied to have the costs of the sale paid out of the general estate:—

Held, that the proceeds of the sale, so far as they were enhanced by the mode of sale adopted, enured for the benefit of the mortgagees as well as of the general creditors, and that, as the mortgagees had obtained the benefit of such increased value, and as they had applied, in the first instance, for a sale of the mortgaged premises in the Land Judge's Court, where the entire costs of sale would have been paid out of the proceeds, they were not entitled to have the costs of the sale paid out of the general estate, but that the costs of the sale should come out of the proceeds of the sale of the mortgaged premises.

Hilliard v. *Moriarty* ([1894] 1 I. R. 316, 319) and *Ross* v. *Ross* (29 L. R. Ir. 318) discussed and distinguished.

Portion of the estate of the late Mr. Edward Breslin, which was being administered by the Court, consisted of a terrace of houses known as Royal Marine-terrace, Bray. These houses were the subject of a certain mortgage to secure the sum of £10,000 with interest at the rate of £5 per cent. The amount found to be due on foot of the said mortgage by the Chief Clerk's certificate up to the 22nd June, 1900, was £10,930 12*s.* 2*d.* On the 7th January, 1899, the mortgagees applied to the Court for leave to file a petition in the Land Judge's Court for the sale of the mortgaged premises. This application was opposed by the defendant, who was the executrix of Mr. Breslin's will, on the ground of expense and delay. The Vice-Chancellor allowed this application to stand over, and directed the defendant to bring forward within one fortnight an application for the sale of such portion of the estate as should be considered desirable.

By an order dated the 7th March, 1899, the defendant was given liberty to advertise for sealed tenders for the purchase, among others, of the plot of ground and houses thereon known as Nos. 1, 2, 3, 4, and 5, Marine-terrace, and the furniture in Nos. 1, 2, 3, and 4. The tenders were considered by the Court on the 1st May, 1900, and an offer of £3000 for the purchase of No. 1, Royal Marine-terrace, together with the furniture therein, was accepted. The tenders for the other houses were considered insufficient, and accordingly the Vice-Chancellor directed the remainder of the houses to be sold by public auction. The auction took place on the 7th June, 1900, and No. 3, Royal Marine-terrace, together with the furniture therein, was sold for £1300; and Nos, 2, 4, and 5, together with the furniture in Nos. 2 and 4, were sold for £3300. The result of these sales was approved of and accepted by the Court.

The defendant applied for an order to have it declared that the costs of the sale should be paid out of the proceeds of the sale of the mortgaged premises.

Henry Richards, for the defendant, in support of the application:—

If the mortgagees had been allowed to proceed with the sale in the Land Judge's Court, they would have had to bear the costs themselves. The defendant allowed the premises to be sold as a going concern, with the furniture, and consented to the sale being carried out in this Court, thereby enhancing the value of the property and saving one-third of the expense in costs. The case is therefore distinguishable from *Hilliard* v. *Moriarty* (1), and *Ross* v. *Ross* (2). In those cases the mortgagees did not come in and ask for a sale; they did not desire a sale. Here the mortgagees applied for leave to sell, and this is practically a sale at the instance of the mortgagees. Moreover, the mortgagees have benefited considerably by the retention of the sale in this Court, and the consequent saving in costs. Taking these special circumstances into consideration, we submit that the general estate should not be held liable for the costs of the sale, but that the costs should come out of the proceeds of the sale of the mortgaged premises.

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(1) [1894] 1 I. R. 316, 319.

(2) 29 L. R. I. 318.

Pim, for the creditors, supported the contention of the defendant.

Jefferson, for the mortgagees, resisted the application :—

The case falls within the rule laid down in *Hilliard* v. *Moriarty* (1), and accordingly the mortgagees are entitled to have the costs of the sale paid out of the general estate. The executor and creditors opposed a sale by the mortgagees : they were merely gambling in an equity of redemption, and the fact, that the value of the premises has not fulfilled their expectations, should not deprive the mortgagees of their right.

H. Richards, in reply ;—

It is not correct to say that the executor and creditors opposed a sale by the mortgagees. The mode of sale adopted was with the consent and approval of all parties, as being the cheapest and most beneficial course to pursue.

THE VICE-CHANCELLOR :—

I am of opinion that there are special circumstances in this case that take it out of the rule as to costs laid down by the Court of Appeal in *Hilliard* v. *Moriarty* (1). The sale was necessary for all parties interested, including the mortgagees, and the mortgagees sought to take proceedings for a sale of the mortgaged premises in the Land Judge's Court ; and if they had gone on with that proceeding, the entire costs of the sale would have been paid out of the proceeds. It appeared, however, to all the parties that it was their interest that the premises should be sold without delay, and that the sale should be retained in this Court. The net proceeds of the premises were enhanced by the saving in costs, for the costs would have been greater if the sale had gone on in the Land Judge's Court, and also by the fact that the premises were sold with the furniture, &c., as a going concern. The value of the premises, which was so increased, enured for the benefit of the mortgagees as well as of the general creditors, and it would be a great hardship that the mortgagees, who themselves made the application for sale in the first instance, and took so large a benefit from it, should be allowed to turn round and contend that the costs should be borne by the party having carriage.

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(1) [1894] 1 I. R. 316, 319.

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I am therefore of opinion, that the costs of the sale must be taken, in the first place, out of the proceeds of the sale of the mortgaged premises.

Solicitors for the applicant: *Reeves & Sons.*
Solicitors for the mortgagees: *Findlater & Co.*
Solicitors for the creditors: *Goodbody & Tisdall.*

J. MAC M.

V.-C.
1900.
Dec. 18.
1901.
Feb. 28.

M'ALOON *v.* M'ALOON.

(1893.—No. 24. 1893.—No. 125.)

Costs—Administration suit—Insolvent estate—Equitable mortgagee proving as creditor—Sale of mortgaged property—Proceeds of sale insufficient to pay mortgage debt—Costs of sale.

In a suit by next-of-kin and heiresses-at-law for administration, equitable mortgagees on real estate of the deceased, not having been called upon to value their security, proved as creditors for the full amount of their debt. The mortgaged property was sold, the personal representative having carriage and the mortgagees lodging the title deeds pursuant to an order. The proceeds of the sale were insufficient to pay the mortgage debt, and the general personal estate was insufficient to pay the balance and the other debts :—

Held, that there were no special circumstances to take the case out of the rule laid down in *Hilliard* v. *Moriarty* ([1894] 1 I. R. 316), and that the mortgagees were entitled to the proceeds of the sale without deduction for the costs thereof.

Allocation and application by the defendant John Bogue, that the allocation schedule as settled by the Chief Clerk might be varied by allowing the said defendant his costs, including (*inter alia*) the costs of sale.

These were consolidated suits by next-of-kin and heiresses-at-law of Andrew M'Aloon, deceased, for the administration of his real and personal estate.

Orders for administration were made in 1893. The original defendant was Sarah M'Aloon, the administratrix of the deceased. The present defendant was the administrator *de bonis non.*

The Ulster Bank, Limited, were mortgagees by deposit of title deeds of real estate of the deceased. They were not called upon to value their security, and they proved for the full amount of their debt. It was certified at £232 19*s.* 10*d.*, and further interest amounted to £89 15*s.* 4*d.* There were other creditors.

The mortgaged property was sold under the order on further consideration dated the 5th November, 1895, the defendant John

Bogue having carriage of the sale, and the bank lodging deeds pursuant to a direction in that order. The sale, which was held on the 25th June, 1899, realized £445, but this sum was reduced by claims for head-rent and other necessary outgoings to £195 14*s.* 1*d.*

The general personal estate was represented by £207 15*s.* 4*d.*

By the allocation schedule as settled the entire £195 14*s.* 1*d.* was applied in part payment of the bank debt, the £207 15*s.* 4*d.* representing personalty being sufficient after deductions for costs to pay 3*s.* 7*d.* in the £ on the balance due to the bank and the other debts. Sarah M'Aloon had been in default; and in the schedule as framed a balance due by her was deducted from the costs of the personal representatives. It was now practically admitted that John Bogue was not disentitled to his costs, and the principal question argued was as to the bank's right to the entire of the £195 14*s.* 1*d.*

Jefferson, for the plaintiffs.

Donaldson, for the defendant:—

This case differs from *Hilliard* v. *Moriarty* (1). There the mortgagee did not prove as an ordinary creditor, whereas in the present case the bank proved for their entire debt against the general assets, and they are in the same position as if they, as creditors, had brought an action for administration. In *Millar* v. *Johnston* (2) and *Ross* v. *Ross* (3) the mortgagees valued their securities, and did not come in conflict with the other creditors. Here the bank not only competed with the other creditors against the general assets, but they took advantage of the proceedings by lodging the deeds and having a sale of the mortgaged premises, which (being incumbrances by deposit only) they could not have effected without a suit, and the costs of the sale should be deducted from the amount realized thereby: see *Dighton* v. *Withers* (4); *Leonard* v. *Kellett* (5). The bank have, under these circumstances, taken themselves out of the rule in *Hilliard* v. *Moriarty* (1). There is no difference as regards the question in controversy between a plaintiff creditor and a person who proves in a suit as such: see *Cope* v. *Breslin* (1) where, as in *Hilliard* v. *Moriarty* (2), a sale could have been had out of Court.

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(1) [1894] 1 I. R. 316.
(2) 23 L. R. Ir. 50.
(3) 29 L. R. Ir. 318.
(4) 31 Beav. 423.
(5) 27 L. R. Ir. 418.

Chambers, and *S. L. Brown, Q.C.*, for the Ulster Bank:—

Hilliard v. *Moriarty* (2) applies. The bank only proved for their debt; they lodged the deeds under an order made against them, and not on their consent; they took no steps towards a sale, and so far from there being any special circumstances against the bank, the great delay in bringing about the sale affords a strong argument in their favour, as for several years after the order for sale the plaintiffs lived upon the premises without paying outgoings, the greater portion of the sale moneys being exhausted in paying arrears of rent.

1901. Feb. 28.

THE VICE-CHANCELLOR:—

The question in this case turns on the decision in *Hilliard* v. *Moriarty* (2). That case decided that a mere consent—much less a standing by on the part of a mortgagee—is not sufficient to deprive him of his ordinary rights, or throw upon him the costs of a sale of the mortgaged premises. If a mortgagee in any way in an administration suit induces the party having carriage to proceed to a sale, or if there be any active participation on his part in the suit, the costs of the sale of the mortgaged premises must come out of the proceeds thereof. In this case have any acts been shown on the part of the Ulster Bank indicating that they actively participated in the direction and management of the suit? Nothing of the kind has been proved. Although it is a hardship that the entire benefit of what has been accomplished by the exertions of the party having carriage should go to the mortgagees, still I am bound by the decision in *Hilliard* v. *Moriarty* (2). Reliance was placed on the fact that the bank had only an equitable mortgage, but I fail to see that it makes any difference whether the mortgage is legal or equitable—a mortgagee, whether legal or equitable, is entitled to stand on his security, and he

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(1) *Ante*, p. 466.

(2) [1894] 1 I. R. 316.

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cannot be deprived of that right by proceedings on the part of a general creditor or any other person. As an ordinary rule the party coming into Court must redeem an incumbrancer, and get in the security for whatever it may be worth.

As to the title deeds, the bank were not parties to the order for lodgment. This was part of the order on further consideration, and it was in the ordinary form adopted in sales of this kind, viz. that the bank should lodge all deeds and documents in their possession, power, or procurement relating to the lands and premises, subject to their rights upon foot of their equitable mortgage. I do not think that the bank by not coming in to oppose that order can be held to have actively consented to the sale.

I must therefore hold that it follows from the decision in *Hilliard* v. *Moriarty* (1) that, there being no special circumstances to take this case out of the rule there laid down, the mortgagees are not to be deprived of the amount of the costs of sale.

As regards the case of *Cope* v. *Breslin* (2), it was there clearly shown that the mortgagees in that case deliberately consented to the sale in this Court; that they did so after consideration and discussion; and that a speedy sale was a matter of great importance to, and for the benefit of, all parties interested. It was also shown that the sale of the mortgaged premises together with the furniture brought in more than would have been realized if premises and furniture had been sold separately.

Solicitor for the plaintiffs: *Henry.*
Solicitor for John Bogue: *Knight.*
Solicitor for the Ulster Bank: *Beauchamp.*

D. M'C. M.

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(1) [1894] 1 I. R. 316. (2) *Ante*, p. 466.

Ross, J.
1901.
Feb. 5.

IN THE MATTER OF THE ESTATE OF FRANCIS ROBERT GRAHAM, OWNER AND PETITIONER.

Landlord and tenant—Land Law (Ireland) Act, 1896, *section* 40—*Land ordered to be sold under the Partition Acts—Receiver appointed by Judge of Chancery Division.*

I. A receiver appointed by a Judge of the Chancery Division is a receiver within section 40 of the Land Law (Ireland) Act, 1896.

II. In a proceeding under the Partition Act, 1868, the Master of the Rolls directed lands to be sold through the Land Judge's Court:—

Held, that section 40 applied.

REQUEST. The petition had been presented by Francis Robert Graham, who was owner of two-sevenths unincumbered parts of the lands in the matter, and it was intituled "In the matter of the Partition Acts and of the Landed Estates Court Act." The absolute order for sale of the undivided share was made on 5th December, 1896, "In the matter of the estate of Francis Robert Graham, owner and petitioner"; and on 19th January, 1897, in the same matter, and also (naming the owners of the other shares), and in the matter of the Partition Acts, an order for sale of the entire of the lands was made "under the said Acts."

The entire estate passed to the several owners as the right heirs of John Flynn, under his will dated more than sixty years previous to the filing of the petition, and the petitioner commenced an action in the Court of the Master of the Rolls; a receiver was appointed to collect the rents, and the sale was directed to be held in the Land Judge's Court.

Conner, K. C., for the owner and petitioner:—

A request cannot issue in this matter, as it is plain that the order for sale was not made under the Landed Estates Court Act, but under the special Acts set out in the title. Section 40 of the Land Act of 1896 is confined to cases where the order for sale is made under the Landed Estates Court Act. The owner's share is unincumbered. If the section applied, the other owners could exercise their right of pre-emption under sect. 5 of the Partition Act, 1868, concurrently with the tenants, which would be absurd. [He cited Madden and Jellett's Landed Estates Court Practice, p. 304.]

Fetherstonhaugh, *K.C.*, and *Coll*, for the tenants :—

There is nothing in section 40 to restrict the meaning of "receiver" to one appointed in this Court. The meaning of that section is that there must be a sale, pending here, of land over which a receiver has been appointed. The receiver in *In re Owen's Estate* (1) had been appointed by the Chancery Division. There is no difference between such a receiver and a receiver appointed here. In the section the term "Landed Estates Court (Ireland) Act, 1858," is wrongly introduced, for the Judge of this Court does not act under that Act alone, but also under the other amending Acts, including the Partition Acts, giving additional powers to the Court. This Court could not sell under the Partition Acts alone, but uses the Landed Estates Court Act for the purpose of carrying out the sale. Before the passing of the Partition Act this Court had jurisdiction only to sell the share of the parties who had submitted to the jurisdiction to sell. The Partition Act extended this power. [They cited Madden and Jellett, p. 30, Note to section 2; and p. 100.] If this Court had power to partition under the Landed Estates Court Act, sect. 3 of the Partition Act gave it greater power to do it without consent. When the matter comes to this Court it is not such a sale under the Partition Acts as takes place in the Chancery Courts, while the conveyance is different, and binds everybody. If the machinery of the Landed Estates Court Act is used, the case comes under the 40th section, and the proceeding being carried out under that Act gives the tenants a status which they would not have, had the matter been retained in the Court of Chancery.

Stritch, *K.C.*, for the owners of the other shares :—

We oppose the issue of a request under the 40th section. *In re Owen's Estate* was the case of an insolvent estate. [Counsel

(1) [1897] 1 I. R. 200.

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read part of the Lord Chief Justice's judgment, p. 208.] The second order was made under the Partition Acts, instead of under the Landed Estates Court Act.

Conner, K.C., in reply:—

If the tenant's claim is right no notice is taken of the Partition Acts at all. It was by them alone that the other owners were brought in.

Ross, J.:—

As to the first point, I am of opinion that a receiver appointed by a Judge of the Chancery Division is a receiver within the meaning of the 40th section, because there is nothing to limit the word to receivers appointed by this Court.

As to the second point, the matter is not so clear. My view of the question is this:—When the Master of the Rolls directed a sale, it was under the power conferred by the Partition Act that the order was made. The order was directed to be carried into effect by a sale through this Court. Accordingly, an absolute order for sale has been made here. The sale is, therefore, the direct result of the absolute order for sale under the Landed Estates Court Act, which brings the case within the 40th section. If the parties wish to appeal I shall give them leave; or if they wish to take the estate out of Court, I shall give them time to do so.

The tenants are entitled to their costs, because it was sought to exclude them from what the law has conferred on them.

Solicitor having carriage: *Ferguson.*
Solicitor for the other owners: *Molloy.*
Solicitor for the tenants: *J. C. Robertson.*

W. C. S.

In THE MATTER of THE ESTATE of HENRY P. GARDE, Owner; St. JOHN BRADDELL, Petitioner.

Ross, J.
1901.
June 10, 12.

In THE MATTER of THE ESTATE of ROBERT S. CAREW, Owner; JOHN G. BAGNELL, Petitioner.

Land Judge's Court—Practice—Revenue—Duty payable on estate sold discharged of superior interests—Landed Estates Court (Ireland) Act, 1858, *s.* 88—*Land Law (Ireland) Act*, 1896.

When land is sold in the Land Judge's Court to the tenants, and superior interests are redeemed, the duty payable under sect. 88 of the Landed Estates Court Act is on the balance of the purchase-money remaining after deducting the price of the redemption of the superior interests.

These cases, involving the same point, were heard together. The notices of motion by the respective petitioners sought a declaration that in fixing the duty on the purchase-moneys payable to the Paymaster-General (Supply Account) under section 88 of the Landed Estates Court (Ireland) Act, 1858, and the Acts amending the same, such duty should only be calculated on the net purchase-money remaining after deducting thereout the redemption prices of a certain quit-rent, of three annuities in lieu of tithe rentcharge payable to the Irish Land Commission, of impropriate tithe rentcharge, of ecclesiastical tithe rentcharges, and of a fee-farm rent, and the exceptions and reservations contained in the grant reserving the rent.

Harrison, K. C., for the petitioner in Carew's estate, and *Conner, K. C.*, for the petitioner in Garde's estate, contended that the duty under the 88th section of the Landed Estates Court Act was payable on the net amount after deduction of the redemption price of the superior interests.

The Solicitor-General (*Wright, K.C.*), *Campbell, K.C.*, and *J. F. Vesey FitzGerald*, for the Paymaster-General, contended that

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In re GARDE'S ESTATE.
In re CAREW'S ESTATE.
June 12.

the duty was payable on the gross amount which was realised by the sale to the tenants.

Ross, J.:—

The question involved is whether the duty payable under section 88 of the Landed Estates Court Act is to be payable on the entire purchase-money realised by the sale of the fee, or only on what remains of the purchase-money after deducting moneys paid for the redemption of superior interests. Before the Act of 1896 the owner's interest in the two estates with which I am dealing would have been sold subject to the quit rent, the fee-farm rent, and the tithes. The Act of 1896 changed all this in cases where sales take place to tenants under the Purchase of Land Acts. The Court is now obliged to make an offer to the tenants to sell to them the fee-simple of their holdings. In case the tenants accept the offer these superior interests must be redeemed out of the purchase-money realised by the sale of the fee. In case the tenants refuse the offer the estate is sold, as it would have been before the Act of 1896, to an outside purchaser, subject to the quit rent, fee-farm rent, and tithes. I now come to apply the 88th section to a case where the tenants have accepted the offers, and the fee has been sold. The duty is to be payable according to the value of the estate sold under the Landed Estates Court Act. The rate is fixed by a percentage on the "gross value of the estate or estates which shall form the subject of each application to the Court." The application to the Court means the petition on which the absolute order was made. That petition does not pray for a sale of the fee-simple, but only for a sale of the estate of the owner in the lands. Here the Legislature interferes, and insists that the petitioner cannot have the relief he sues for until the Court has made an offer to vest in the tenants the entire fee-simple, which includes the estate or interest dealt with by the absolute order. It is contended on behalf of the Crown that, having regard to the present state of the law, a petition to sell an estate must be treated, in case the sale is effected to tenants, as if it were a petition to sell the entire fee. I refuse to strain the section in this way in favour of the Crown as against the subject. The gross value contemplated

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In re Garde's Estate.
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by the 88th section is the gross value of the estate directed to be sold by the absolute order.

It certainly would be an extraordinary thing that an owner could sell in the Land Commission Court without paying any duty, except the stamp duty on the vesting orders, if not paid by the tenants; whereas in this Court he would be obliged to pay an additional duty under the 88th section. I therefore decide against the Crown, and grant the motion in its terms in each case. I have some doubt about one of the classes of tithes, but as the Solicitor-General and the counsel for the estates agree in thinking that the quit-rent, fee-farm rent, and these classes of tithes are all in the same position, it is not necessary for me to raise the question.

Solicitor having carriage in Garde's case: *Howe.*
Solicitor having carriage in Carew's estate: *Exham & Son.*
Solicitor for the Paymaster-General: *Sir P. Coll.*

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SPENCER CAMPBELL THOMPSON, SIR BENJAMIN WHITNEY, WILLIAM JOHN DUNDAS, GEORGE DALZIEL, AND ARCHIBALD ROBERT CRAUFORD PITMAN, PLAINTIFFS;

CHARLES COLEMAN DIGNAN, ANGELINA VICTORIA DIGNAN, JOSEPH DIGNAN, ALFRED DIGNAN, BERTIE DIGNAN, MAUD DIGNAN, ANGELINA DIGNAN, MABEL DIGNAN, STEPHEN ST. LAWRENCE BURKE, AND ANDREW ST. LAWRENCE BURKE, DEFENDANTS.

Solicitor—Bill of costs—Fees for (a) *instructions for defence,* (b) *settlement of defence, and* (c) *settlement of interrogatories by senior counsel.*

Upon taxation of costs in an action brought to have a deed set aside, the Taxing Master (1) allowed £5 5*s.* for instructions for defence, and (2) disallowed fees to senior counsel for settling defence and settling interrogatories. Upon hearing of a summons to review the taxation, the Land Judge allowed senior counsel's fee for settling the defence, but disallowed the fee for settling the interrogatories, and he sent the matter back to the Taxing Master to reconsider the sufficiency of the sum allowed for instructions for the defence, having regard to the allowance of the fee to senior counsel for settling the defence.

SUMMONS TO REVIEW TAXATION.

On the 13th December, 1898, a petition was filed in the Land Judge's Court by Spencer Campbell Thompson, trustee of the Standard Life Assurance Company, and Sir Benjamin Whitney, setting out that on the 26th October, 1887, the petitioners and William Moncrieff jointly entered up a judgment in the Common Pleas Division against Charles Coleman Dignan, the owner named in the petition for the sum of £250, besides the sum of £171 3*s.* 5*d.* for costs, making together the sum of £421 3*s.* 5*d.*, which was registered as a judgment mortgage on the 9th December, 1897, against the interest of the owner in the lands mentioned in the petition; that Charles Coleman Dignan, being seised in

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fee in possession of the lands, by a voluntary conveyance dated the 26th May, 1894, purported to grant to certain trustees the same lands upon trust for himself for life, and, subject to a jointure to his wife, for his children as therein; and that the petitioner charged that this deed was not in fact made *bona fide*, and was made with a fraudulent intent, and was void as against this and another judgment mortgage. Upon the petition the following query was made by the Land Judge on 20th December, 1898:—"No order can be made on this petition. It must be first established that the deed of 1894 is, as alleged, fraudulent and void as against the petitioners." On the 24th January, 1899, upon an application to discharge the query, it was ordered that the petitioners should be at liberty, if so advised, to bring an action to be tried before the Land Judge to have the deed of conveyance of the 26th May, 1894, declared fraudulent and void. On the 7th March, 1899, pursuant to the order, an action was instituted to have the deed declared fraudulent and void. On the 20th April, 1899, the statement of claim was delivered, and on the 12th July, 1899, the statements of defence of the several defendants were delivered, and issue was joined on the 17th October, 1899. By order of the 1st November, 1899, the plaintiffs were given liberty to deliver interrogatories for the examination of Charles Coleman Dignan, which were delivered; and on the 25th November, 1899, the defendant Charles Coleman Dignan's answer to the interrogatories was filed. Having regard to the answer given by Charles Coleman Dignan, the plaintiffs in the action and petitioners in the matter determined not to proceed with the action, which was accordingly, by order of the 7th November, 1900, dismissed upon the terms of the plaintiffs paying the defendants their costs in the action properly and necessarily incurred, when taxed and ascertained. Upon the taxation of costs several questions arose upon items which are the subject of this report. The items were considered in the order given below.

Items 45, 46, 47, copy defence to send senior counsel, 6*s.* 4*d.*; attending Mr. Fetherstonhaugh, 6*s.* 8*d.*; paid his fee, £4 4*s.* The Taxing Master disallowed these: the following grounds of objection to the disallowance was given—"Owing to the nature of the action and the charges of fraud alleged, and the fact that there were ten defendants (some of whom were infants) who had to plead, junior counsel considered it necessary to have the assistance of senior counsel on the questions involved, and as to whether there ought to be more than one defence delivered. Four separate defences were delivered, and if junior counsel was paid £2 2*s.* in each it is submitted he would have been entitled to same, and, therefore, the plaintiff has to pay no extra costs by reason of the employment of senior counsel." The Taxing Master's ruling on the hearing of the objection was, "Not allowable, therefore overrule."

Fetherstonhaugh, K.C. (with him, *J. B. Burke*), in support of the items claimed, cited *M'Cann* v. *The Newry Town Commissioners* (1).

Shaw, for the plaintiffs :—

The defence was, except one paragraph, merely a traverse. The item is purely discretionary, and the Taxing Master has exercised his discretion.

Fetherstonhaugh, in reply, cited *Mahalm* v. *M'Cullagh* (2); *In re Galway Election Petition* (3); *Robb* v. *Connor* (4). The shortness of the defence is no criterion of the difficulty of the case.

Ross, J. :—

I see that the case was complicated, and I consider that it was reasonable that senior counsel should be employed. I think the fee paid not excessive. Let the items 45–47 be brought back to the Taxing Master, with a direction to allow them.

Items 67–69: Copy answers as settled by junior counsel for settlement by senior counsel, 4*s.*; attending Mr. Fetherstonhaugh, 6*s.* 8*d.*; paid his fee, £3 3*s.* These were disallowed by the Taxing Master, and the grounds of the objection to the disallowance were "owing to exhaustive nature of the interrogatories it was considered by junior counsel absolutely necessary to have the assistance of senior counsel upon settling the answers. The answers resulted in the plaintiff bringing forward a motion for leave to dismiss his action." The Taxing Master's ruling on the hearing of the objection was "not allowable, overrule."

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(1) [1899] 1 I. R. 342.
(2) 31 L. R. Ir. 147.
(3) I. R. 7 C. L. 445.
(4) I. R. 9 Eq. 373.

Fetherstonhaugh, K.C.:—

The settlement of the interrogatories was not easy; in *Jessop* v. *Cusack* (1) the fee to senior counsel for settling interrogatories was allowed.

Ross, J.:—

I have read all the interrogatories. In my opinion senior counsel was not required.

I shall make no order as to these items.

Item 26. Instructions for defence, as follows: attending, searching record of proceedings in estate of Annesley Knox Gore and Adelaide Frances Owen, and taking particulars therefrom; perusing petitions in these matters; attending, bespeaking copies order, and petitions; attending at Registry of Deeds; searching for and bespeaking copies judgment mortgages registered against defendant by plaintiffs; perusing same; perusing settlement of 26th May, 1894; perusing notice of assignment; preparing statement of income and liabilities for counsel; perusing will of Bridget Dignan, deceased; like will of John Dignan; like fee-farm grant of 23rd February, 1859; correspondence with Mr. Charles Dignan. The matter was of a complicated nature and involved care and labour in investigating the facts. Amount claimed, £12 12*s.*; amount allowed, £5 5*s.* The following were the grounds of the objection to the allowance:—"The allowance is inadequate, having regard to the nature of the case, the documents perused, and attendances involved." The Taxing Master's ruling on the hearing of the objection was:—"In my judgment I allowed a sufficient fee, therefore overrule objection."

(1) 25 L. R. Ir. 244.

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Fetherstonhaugh, K.C. :—

Having regard to the nature and gravity of the case and to the sum which you have allowed for the settlement of the defence, we consider that the sum allowed by the Taxing Master was too small.

Shaw :—

This is a matter of discretion, and the Taxing Master has exercised his discretion. See Rules of 1893, Order LXV., Rule 64 (3).

Ross, J. :—

I shall allow the Taxing Master, having regard to the decision which I have given as to items 45–47, to reconsider the sufficiency of the sum allowed in respect of item 26. Let the parties bear their own costs.

Solicitor for the plaintiffs: *D. F. Moore.*
Solicitor for the defendants: *David Dunne.*

W. C. S.

V.-C.
1901.
June 6.

M'KENNA *v.* M'KENNA.

(1901. No. 212.)

Administration—Will propounded by devisee of real estate, and disputed by testator's widow—Action settled by consent—Pecuniary legatees—Order of Probate Court, directing costs to be paid out of assets—Priority.

The will of a testator was propounded by a devisee of real estate, and disputed by testator's widow, who were respectively plaintiff and defendant in the probate action, which was settled by consent, the terms being that the plaintiff should relinquish to the defendant a portion of the interest in the realty, devised to him under the will, and that the will should be admitted to probate, and that plaintiff and defendant should have their costs out of the assets. The pecuniary legatees were not parties to this consent, which was made a rule of Court, but were aware of it, and did not object.

The pecuniary legatees having applied for the administration of the personal estate of the testator, by consent the sole question left for the determination of the Court was, in what priority the costs of the probate action were to be paid :—

Held, that those costs should be paid rateably, according to the respective values of the real and personal estate.

Patrick M'Kenna, the deceased in this matter, died on the 14th January, 1900, without issue, leaving his widow Catherine M'Kenna him surviving; he left a will dated 12th July, 1894, whereby he bequeathed to the plaintiffs certain pecuniary legacies, viz.: £100 to John M'Kenna, Senior; £200 to Ellen Grimes; £200 to Peter M'Kenna; £40 to Rose M'Kenna; and £100 to John M'Kenna, Junior, who were his nephews and nieces. He also bequeathed two small farms, held in fee, to Peter M'Kenna and his wife respectively. The testator was also possessed of a large farm in the townland of Drumever, in the county of Monaghan, containing about 120 acres, held in fee, which he devised to his wife for life, and on her death to the Most Rev. Dr. Owens, the Roman Catholic Bishop of Clogher.

The will was disputed by the widow on the ground of want of testamentary capacity, and an action was instituted by Bishop Owens to have the will established, and administration with the will annexed granted to him. On the 8th June, 1900, a consent was entered into between the widow Catherine M'Kenna and Bishop Owens, which was as follows:—"The plaintiff is to be at liberty to prove the will, and obtain a grant of administration with the will annexed, the plaintiff undertaking to convey to the defendant his interest in remainder in the lands of Drumever, save the house, office-houses, and 20 acres of land (statute) around the house, to be defined by Joseph Withrington; the said Joseph Withrington to have power to provide all necessary roads, and to apportion the annuity payable to the Irish Land Commission out of the lands. All pleas to be withdrawn; the defendant to have her costs out of the assets, and the plaintiff to have his costs as executor's costs." The pecuniary legatees were not parties to the consent, but were aware of it, and did not express any disapproval of it. The consent was made a rule of Court, but subsequently the Court refused to give a grant of administration to Bishop Owens, on the ground that he had no interest in the personalty, and accordingly the widow was appointed administratrix. From an account furnished to the plaintiffs in the present proceeding by the administratrix, it appeared that there was only a sum of £299 14*s.* 5*d.* available for payment of the legacies, after the payment of the funeral and testamentary expenses, and costs of the probate suit.

The plaintiffs, who were the pecuniary legatees, having applied for an order for the administration of the personal estate of the deceased, a consent was entered into between the parties on the following terms, viz.:—"That, without any order for the administration of the estate of the deceased, the determination of the Court be sought on the following question, viz.:—Whether the items of £154 3*s.* 8*d.* and £136 19*s.* 3*d.* appearing in the account of the administratrix, referred to in the plaintiff's affidavit, and therein described as "Bishop Owens' taxed costs of probate suit," and "Mrs. M'Kenna's do." are payable in priority to the pecuniary legacies left by deceased's will; and that the costs of the proceedings, including the costs of this consent and of making same a rule of Court, be costs in the matter.

Brown, K.C., and *Dromgoole*, for the plaintiffs:—

The pecuniary legatees were aware of the proceedings in the Probate Court, but were not parties to the consent, and are not bound by it. The plaintiff and defendant in the probate suit were interested in the realty only, and it would be inequitable that the costs of proceedings, which enabled the devisees of the realty to settle their differences, should fall upon the personalty: *Gillooly* v. *Plunkett* (1); *M'Feely* v. *Boyle* (2); *Bagot's Estate* (3); *Wytcherley* v. *Andrews* (4).

Gordon, K.C., and *Chaytor*, for the defendant, the administratrix:—

The administratrix is entitled to have the full costs of having the will established paid to her out of the personalty. The legatees benefited by having the will established, for the widow would have been entitled to £500, as a first charge under the Intestates Estates Act, 1890, if the will had been set aside, and also half the residue of the personal estate. It was the interest of the administratrix to have the will set aside. Is she to pay for what she has done against her own interest?

(1) 9 L. R. Ir. 324.
(2) 17 L. R. Ir. 633.
(3) [1900] 1 I. R. 496.
(4) L. R. 2 P. & D. 327.

Wylie, K.C., and *W. H. Brown*, for Bishop Owens :—

We took steps to establish the will with the knowledge and consent of all parties. The will was contested on the ground of want of testamentary capacity, and it was necessary for some one to propound it, otherwise the legatees would have had to bear the expense of doing so; we are therefore entitled to be paid the costs, necessarily incurred for the purpose of establishing the will, out of the personal estate. [They cited *Wilkinson* v. *Corfield* (1); *Graham* v. *M'Cashin* (2).]

The Vice-Chancellor :—

This case comes before me on a question of costs. A summons was brought to have the estate of the testator administered, but by consent the sole question for the determination of the Court was, whether the items of £154 3*s.* 8*d.* and £136 19*s.* 3*d.* appearing in the account of the administratrix, referred to in the plaintiff's affidavit, and therein described as "Bishop Owens' taxed costs of Probate suit," and "Mrs. M'Kenna's do." are payable, and out of what fund; and whether in priority to the pecuniary legacies left by the will.

In considering this question I desire to repeat the view of the law stated by me in *Gillooly* v. *Plunkett* (3) in which I decided that this Court, when it comes to the administration of an estate, in giving effect to the decrees or orders of the Court of Probate, as to costs made upon consent, exercises in reference to them a control over the payment of such costs, and retains its power in the administration of assets to decide the order and priority in which such costs are payable. This will was made by a man whose testamentary capacity was disputed. By the will certain parties got pecuniary legacies, and among the assets was a farm, supposed at first to be personal estate, but which afterwards turned out to be real estate of the testator. The widow disputed the will, and Bishop Owens who was the devisee of the farm, subject to the widow's life estate, brought an action in the Probate Court to establish the will. When the case came on for trial, it was compromised by the parties thereto, and the effect of that compromise was, that the will should be admitted to probate, and that the

(1) 6 P. D. 27. (2) [1901] 1 I. R. 404. (3) 9 L. R. Ir. 324.

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plaintiff therein should obtain a grant of administration with the will annexed, the plaintiff undertaking to convey to the defendant his interest in remainder in the lands, save the house, office-houses, and 20 acres of land round the house. The only provision as to costs was, that the defendant was to have her costs out of the assets, and the plaintiff to have his costs as executor's costs. That does not affect the jurisdiction of the Court, as laid down in the case of *Gillooly* v. *Plunkett* (1). The parties disputing the will were the devisees of the real estate, of which this farm formed the largest and most valuable portion. Bishop Owens, as a condition to the widow's joining in the consent, and having the will established, was to convey to her his reversion in the farm, save the part excepted by the consent. That consent was received and adopted by the Probate Court. The question now is, who is to bear the costs of that litigation? There appear to have been strong grounds for disputing the will, but whether the action would have been successful is a different matter. However, all the parties who took benefits under the will, although the litigation as to the farm arose only between the devisees of the real estate, must be held to have been interested in having the will established; for if the will were not established, the pecuniary legacies could not have been paid.

I shall therefore declare, that the widow and the plaintiff are entitled to be paid their costs of the probate suit out of the assets; and under the circumstances of the case I am of opinion, that it would be inequitable to hold, that the whole burden of the costs should fall on the personal estate, and I shall therefore direct that these costs shall be paid rateably out of the real and personal estate according to their respective values. In the event of the parties not agreeing as to such respective values, I shall direct an inquiry at Chambers as to value. I also declare the parties entitled to the costs of the present proceeding, to be paid rateably in like manner as the costs of the probate suit.

Solicitors for the plaintiffs: *Corr & O'Connor.*
Solicitor for the administratrix: *Baillie.*
Solicitor for Bishop Owens: *Callan.*

J. MAC M.

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(1) 9 L. R. Ir. 324.

IN RE M'MAHON, DECEASED.

M'MAHON *v.* M'MAHON.

(1900. No. 445.)

V.-C.
1900.
Nov. 27.

Will—Construction—Gift of farm—Devisee directed to pay legacy—Personal liability—Order for payment—Order LV., Rules 4, 11—*Practice.*

A testator bequeathed a certain farm with the stock thereon to his son. There were certain conditions attached to the gift, and amongst them the following :—"It is my will that the said Thomas M'Mahon, my son, do pay off all my debts and burial expenses. It is my will that my son, the said Thomas M'Mahon, do give unto my daughter, Catherine M'Mahon, the sum of £350, to be paid to her in three instalments." The son went into possession of the farm under the will :—

Held (on an originating summons, taken out by Catherine under Order LV., Rule 4), that he was personally liable for the payment of the legacy to her.

Order made directing Thomas M'Mahon to pay legacy within three months.

BY his will, bearing date the 19th June, 1896, the testator Daniel M'Mahon devised to his son Thomas M'Mahon, his "chief and entire holding at Glandine, together with all the stock thereon." He directed his son the said Thomas to give to his daughter Ellen a brood mare, and grass and fodder for the same, for 12 months. He also directed him to give the use of a room in the house, and the use of portion of the garden, to his daughters Bridget and Ellen for a certain period, and certain articles of furniture. The will then contained the following clauses :—"It is my will that the said Thomas M'Mahon, my son, do pay off all my debts and burial expenses. It is my will that my son the said Thomas M'Mahon do give unto my daughter Catherine M'Mahon the sum of £350, to be paid to her in three instalments, that is to say, £100 on the 1st of March, 1898, and £150 on the 1st day of March, 1899, and the remainder £100 on the 1st day of March following."

Daniel M'Mahon died on the 9th August, 1896, and a grant of administration, with the will annexed, was made on the 27th May, 1899, to Ellen M'Mahon. Immediately after the death of Daniel M'Mahon, the said Thomas M'Mahon went into possession of the farm and stock, but up to the date of the present proceeding, he had failed to pay any portion of the above-mentioned sum of £350.

The present question came before the Court on an originating summons, taken out by Catherine M'Mahon, to have the question determined, whether Thomas M'Mahon had rendered himself personally liable for the payment of the above-mentioned legacy of £350.

A. E. R. Joynt, for the applicant:—

Upon the face of the will, the legacy to the plaintiff is not a charge on the lands devised to Thomas, but a personal liability imposed on him by the testator, the burden of which, by his acceptance of the devise of land and the stock thereon, he has undertaken to fulfil. There does not seem to be any case in which, directly at the legatee's suit, such a liability has been imposed by the Court upon a devisee, though in an administration action the liability would be, and must often have been, enforced as of course; but a long line of authorities show that in such a case as the present, the devisee's liability is personal. The cases referred to deal with the enlargement, prior to 1838, of an indefinite devise of lands from a tenancy for life into a fee-simple, by reason of the creation of a charge by way of legacy to another upon the lands devised, or by the imposition by the testator of a personal obligation upon the devisee to pay to another a sum of money in gross, or to perform at his expense some duty for the benefit of others. The principle, upon which such enlargement of the devisee's estate was imposed, did not depend necessarily upon whether the burden was a charge on the land devised, or a personal obligation on the devisee. Many of the cases go upon the one ground, as where the devise is expressly "subject to" payment of debts or legacies, but many also upon the imposition of a personal liability, equivalent to an indebtedness and legal obligation to pay on the devisee's part: *Pickwell* v. *Spencer* (1), *Moor* v. *Denn* (2), *Lloyd* v. *Jackson* (3), *Willey* v. *Holmes* (4).

(1) L. R. 7 Ex. 105.
(2) 2 B. & P. 247.
(3) L. R. 2 Q. B. 269.
(4) 8 Term R. 1.

The testator's estate, save for the plaintiff's legacy, has been fully administered, and it would be a hardship, that expense should be incurred by a general administration, in order only to enforce the plaintiff's right. If the Court determines in the affirmative the question submitted for its determination, the plaintiff submits that she is entitled, under Order LV., Rule 11, to an order for payment to her by the defendant of the amount of the legacy.

Charles Doyle, for the administratrix.

The devisee was not represented.

The Vice-Chancellor :—

In this case the testator begins his will by leaving to his son Thomas his "chief and entire holding at Glandine, together with all the stock thereon"; and then proceeds to impose certain terms, upon which the bequest was given, by directing Thomas to give to his daughter Ellen a brood mare, and grass and fodder for the mare for twelve months, and to his daughters Bridget and Ellen, the use of a parlour in his house for a certain period, and other things which may be passed over. The testator then goes on to say, "It is my will that the said Thomas M'Mahon my son, do pay off all my debts and burial expenses." Now if the will stopped there it would be impossible to hold, that the farm was not given to Thomas, subject to conditions to be performed by him, or that he could escape the obligations imposed on him. Then comes the clause on which the question is raised, which must be read in connection with what precedes. It is as follows: "It is my will that my son the said Thomas M'Mahon do give unto my daughter Catherine M'Mahon the sum of £350, to be paid to her in three instalments." There was no possible way of providing for the payment of this sum, except by its being conditional on Thomas to pay it, and it is not coupled in any way with the interest in the farm. Standing by itself, it is simply a legacy to be paid by Thomas, and the only reasonable construction is, that the legacy of £350 was a personal obligation on Thomas, upon which he was to take the farm. He was not forced to accept the gift; but it is quite clear that he has actually accepted it, and the statement to

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that effect that has been made in the case has not been contradicted by him. The fact of his acceptance of the gift, which I hold to be subject to this condition, makes him personally responsible for the payment of the £350 to the testator's daughter. If he chose to take a property subject to a condition, he was bound to fulfil the obligations attached to it. It is not open to him now to set up the case that the property is not of sufficient value. He has taken his chance for that, and it is immaterial whether it is so or not.

I am therefore of opinion, that Thomas M'Mahon has rendered himself personally liable to Catherine M'Mahon for the payment of this sum of £350, and I shall accordingly make an order to that effect.

Order accordingly, declaring Thomas M'Mahon personally liable for the payment of £350, *amount of legacy, and directing him to pay same within three months.*

Solicitor for the applicant: *Kelly.*
Solicitor for the administratrix: *Doyle.*

J. MAC M.

M. R.
1900.
March 9, 10, 13, 24.
Appeal.
June 20, 21.

ALLIANCE AND DUBLIN CONSUMERS GAS CO. v. DUBLIN COUNTY COUNCIL.

(1899. No. 1136.)

Gas pipes—Repair of roads—Use of steam rollers—Statutable rights—Injury to property in the exercise of such rights.

The plaintiffs, a gas company, laid down pipes under the surface of certain roads, as they were entitled by statute to do, in order to supply gas for public and private purposes. The defendants were charged by statute with the duty of maintaining the roads in the county, and were for that purpose authorised to purchase or hire a steam roller. The defendants used steam rollers for the repair of the roads, but the rollers were so heavy as to frequently injure the plaintiffs' pipes, though they were laid at a depth sufficient to be safe from injury by the ordinary traffic and ordinary mode of repair, if such rollers had not been used:—

Held, that the plaintiffs were entitled to an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs then properly laid under the roads, regard being had to what, at the time of the laying of the pipes, was the ordinary traffic, and the reasonable means of repairing the roads.

Trial of Action.

This action was brought by the Alliance and Dublin Consumers Gas Company against the Dublin County Council. The statement of claim alleged as follows:—

The plaintiff company was incorporated by the Alliance and Dublin Gas Act, 1866 (29 & 30 Vict. c. ccv., loc. & pers.), entitled "An Act for incorporating the Alliance and Dublin Consumers Gas Company, formed by the amalgamation of the Alliance and Dublin Consumers Gas Company, and the Commercial Gas Company of Ireland, Limited, and for authorising the acquisition by the Company of gas works and property of the United General Gas Company, and for defining the limits within which the Company may supply gas, and for other purposes."

By section 3 of the said Act of 1866 the Gas Works Clauses Act, 1847, is, with other statutes therein mentioned, incorporated therewith, and by section 6 of the said Act of 1847, gas companies (therein referred to as "the undertakers") are empowered to open and break up the soil and pavement of the several streets, in the said Act defined as including "any highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act, and bridges within the limits of the special Act, and to open and break up any sewers, drains, or tunnels within or under the said streets and bridges, and to lay down, and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, . . . and for the purpose aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may . . . do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the districts within the said limits."

By section 6 of the said Act of 1866 the limits within which the plaintiff company are authorised to supply gas are defined, *inter alia*, as follows:—"The townships, parishes, or places of

Clontarf, Artane, Clonturk, and Drumcondra, in the barony of Coolock; Glasnevin, Finglas, and Castleknock, in the barony of Castleknock; Palmerston, in the barony of Uppercross; Taney Hill, Rathmichael, Kilmacud, Killiney, and Old Connaught, in the barony of Rathdown; Rathfarnham, in the baronies of Uppercross and Rathdown; all in the county of Dublin."

By section 44 of the said Act of 1866 the plaintiff company are authorised within the above limits to exercise certain powers, and do certain acts, and, amongst others, to lay down mains, pipes, and other works and apparatus.

For the purpose of supplying gas within the aforesaid townships, parishes and places, divers mains, pipes, and other works have been duly and properly constructed, and laid in and under certain roads, streets, and highways, within the said townships, parishes, and places by the said plaintiff company, and in particular in and under certain roads and streets known as Kilmacud-road, in the parish of Kilmacud, and barony of Rathdown; Cabra-road, in the parish of Grangegorman, and barony of Coolock; and Harold's Cross-road, in the parish of Rathfarnham, and barony of Uppercross, all within the said townships, parishes, and places. The said mains, pipes, and works are the property of the plaintiff company.

The defendants are a corporation, incorporated by the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), entitled "An Act for amending the law relating to Local Government in Ireland, and for other purposes connected therewith:" and they execute the office of, and are surveyors of, highways within all the said townships, parishes, and places, and appoint the county surveyor.

The defendants in repairing the roads, streets, and highways within the said townships, parishes, and places, have for some time past used, or caused to be used, and still use, and cause to be used, steam and other rollers of very great weight, and in such a manner as in numerous cases to break, and bend, or otherwise damage, the mains, service pipes, and other works of the plaintiff company under the said roads, streets, and highways, and to cause serious escapes of gas and great danger of explosion.

The plaintiff company contended that such use of the said rollers by the defendants was negligent and improper on their part, and they also submitted that, even if such rollers were not negligently or improperly used, the defendants had and have no authority to use, and are not entitled to use, rollers of such a weight as would, even if properly used, injure the plaintiff company's mains, pipes, and other works, and that the defendants are liable to the plaintiffs for the damage caused to their property as aforesaid, by the use of such rollers. Such use has already caused very great damage to the plaintiff company, and if continued will cause still greater and even irreparable damage to the plaintiff company. Five specific instances are then mentioned in which it is alleged that the mains or pipes of the plaintiffs have been injured by the defendants' steam rollers, namely—(*a*) Close to Sydenham House, the residence of Mr. W. Hamilton, on Kilmacud-road, in the parish of Kilmacud, and barony of Rathdown, aforesaid, on or about the 30th September, 1899; (*b*) On the railway bridge of the Dublin, Wicklow, and Wexford Railway Company, over which the said Kilmacud-road passes, in the said parish of Kilmacud, and barony of Rathdown, on or about 23rd October, 1899; (*c*) Close to the gate of Overton, on the said Kilmacud-road, in the said parish of Kilmacud and barony of Rathdown, on or about the 4th of November, 1899; (*d*) Close to the half-way house on Cabra-road, in the parish of Grangegorman and barony of Coolock, on or about the 24th of November, 1899; (*e*) At Kenilworth Park, on the Harold's Cross-road, in the parish of Rathfarnham, and barony of Uppercross, on or about the 27th December, 1899.

The plaintiff company repeatedly applied to the defendants to discontinue such use as aforesaid of the said rollers, and to make good the damage caused to the plaintiff company thereby, but the defendants have always refused, and still refuse, so to do, and they threaten and intend to continue, and, unless restrained by order of this Honourable Court, will continue such use.

The plaintiffs claimed (1) An injunction to restrain the defendants, their servants, agents, and workmen from using, or causing to be used, any steam or other roller in such a way as to fracture, damage, or injure the gas mains, service pipes, or other works of the plaintiffs;

(2) Damages for injuries to the gas mains, service pipes, and other works of the plaintiffs by reason of the negligence of the defendants in the use of steam and other rollers upon the streets, roads, and highways of the administrative county of Dublin; or, in the alternative,

(3) Damages for injuries caused to the said gas mains, service pipes, and other works of the plaintiffs by the defendants in the use and management of certain steam and other rollers in the said county;

(4) An inquiry as to the amount of the said damages.

Ronan, Q.C., *Gordon*, Q.C., and *Jonathan Pim*, for the plaintiffs.

O'Shaughnessy, Q.C., *Healy*, Q.C., and *Clancy*, for the defendants.

March 24.

The Master of the Rolls:—

The defendants admit liability as to the injury at Harold's Cross road, and have paid money into Court, which the plaintiffs have drawn out in satisfaction of the injury. Of the remaining four instances complained of, one is alleged to have happened at Cabra. I have no doubt that the injury there was caused by the use of the steam-roller; but I am not sure that it might not have been caused by ordinary traffic. What was called by some of the witnesses a syphon box, but what was in reality a pressure box, was set there, covering a vertical pipe intended to afford means of testing the pressure supplied in the gas company's mains. This box was set too near to the road surface; in fact it was actually above the surface when seen by some of the witnesses, some said as much as two inches. This of course was improper, and though it was not clear that the plaintiffs are responsible for its condition when seen, the plaintiffs have to make out their case, and I am not satisfied that it was ever properly laid. Not as a matter of law, but as a matter of common sense, I think that such an instrument ought to have a secure foundation of concrete, brick, or other firm material, which would prevent it being forced down upon the pressure pipe. I do not believe for a moment that it was left by the plaintiffs resting (as was suggested) upon a bunch of hay; but it was not properly constructed, even if the surface of the roadway was lowered by wear so as to leave the lid of the box exposed—which is probably the case. I believe the same injury might have been caused by the wheel of a loaded cart, and so I must decline to hold that the damage resulted from anything special or peculiar in the operation of the steam roller.

There remain the three complaints in respect of Kilmacud. One of these is in respect of a main on the slope of a bridge which crosses the Dublin Wicklow & Wexford Railway. The main was undoubtedly broken there some two or three yards from the crown of the bridge.

It was said that as there was no proof that the roller had been seen over the spot after the 3rd October, and as the complaint was not made till the 24th, the injury could not have been caused by the roller. But the fracture was underground at first, it might be no more than a crack which would afterwards widen. Detection depends upon the presence of the smell of gas. There may be an escape of gas on a public road not noticed by any person, or noticed only by some one who pays no attention to it, or at least does not care to make it his business. Mr. Collen, the defendants' chief surveyor, while not admitting that the main was broken by the roller, did not take the ground that the roller had not been there, or could not have caused the damage, though he thought it probable it had been caused by a cart. I find, however, the roller at work on this road about the time in question, and I was much struck by the fact that the defendants could have proved, if it were the fact, that the roller was not to blame, either by establishing an *alibi* for it, or by showing that, if there, it did not pass over the pipe in question. While the defendants gave me a large amount of skilled evidence of weight, they did not produce the driver of the roller or rollers, or anyone whose duty it was to attend it or them when working. There is no evidence of any heavy dray having gone over the place. I think this main was broken by the steam roller. Whether the defendants are responsible or not is a different question.

The service pipe at Sydenham is practically admitted to have been broken by the defendants. Mr. Collen says it probably was, though a heavily loaded dray might have done the mischief. In the place in question, however, owing to the very steep hill at the end of the road (stated to be 1 in 15), very heavy drays are almost an impossibility—and it seems there are no public-houses to be supplied from porter drays, save just at the two ends. I do not recollect any evidence of heavy loads being drawn on the Kilmacud road other than carts with farm produce and the like, except Mr. Collen's statement that Guinness's drays sometimes used it, and I believe there is none at all of any such dray having been recently at the place in question, whilst the roller was undoubtedly working there. Indeed I think Mr. Healy admitted this.

At Overton I do not think that there is evidence that the pipe was actually broken, but it was drawn : that is, the junction with the main was severed by down pressure on the pipe, which being of wrought iron and so somewhat flexible, burst out of shape and out of position. As to the injury to a main at Harold's Cross, for which £11 odd was paid in, liability is of course admitted; but it is right to say that the explanation given is this. It is said that the Tramway Company had opened the ground over the pipe, and had filled it in improperly, that is, so loosely that Mr. Collen sent the roller to consolidate the surface. Finding the sub-soil very soft, he caused some stones to be placed on it, which being crushed in, caused the mischief. This explanation is hardly satisfactory, the main being from 18 inches to 2 feet down. I cannot, however, treat it under the circumstances as an unqualified admission of the use of rollers in themselves unfit or unsuitable, as distinguished from an accident of an isolated character. Still I have come without doubt to the conclusion that in some cases the defendants' rollers have injured the mains or pipes of the plaintiffs.

The main contention in the case, however, was that, even if so, the defendants are not liable, the mains and pipes having been improperly and negligently laid, so as to have been unsafe and inadequate. Before considering the law applicable to the case it is best to conclude the ascertainment of the facts. As to the defendants, I am of opinion that there is no negligence attributable to them in the management of their steam rollers. It is not shown that they worked them in an improper manner, or that they were improperly constructed and heavier than such rollers commonly used elsewhere. Still less is it the case that the defendants wilfully or knowingly brought the rollers where pipes were, intending to injure them. Negligence and mischievous intent on the part of the defendants are alike out of the case.

But the action is not brought solely or mainly for negligence, and does not depend upon it. The only negligence in question is that with which the plaintiffs are charged, and it is relied on by the defendants that the mains and pipes are "unduly" near the surface of the roads, whereby the damage has occurred, which would not have occurred had they been laid at a "proper" depth. That the damage would not have happened had the pipes and mains been laid at a much greater depth, say 6 feet, seems reasonably clear. If, on the other hand, the pipes had been laid flush, or almost flush, with the ground, there can be little doubt that that would have been "undue" and "improper." These are extremes. The difficulty only exists when we come upon the debatable land between them.

Now the law gives us one test, and one test alone, as to what is, and what is not, a proper depth for laying gas mains under a public road. It does not define it in feet and inches, nor could it, since the nature of the soil and the material and thickness of the mains employed must be taken into consideration in any given case. And there is no statutory enactment bearing on the subject; 18 inches might not be enough at one place, while much less might suffice at another. The only test the law supplies is that the depth must be such as to render the mains and pipes safe from injury by the ordinary traffic of the district in which they are laid. That is the question. Another allegation of negligence is that which was suggested as to the age and condition of the pipes themselves; but this entirely broke down. "The life of a pipe" (like many other lives) depends upon its surroundings. In some situations it corrodes and is worn away in a comparatively short space of time. In others it may last for an indefinite period. The mains used by the gas company at the place in question (and they are all the same) are perfectly sound at the present day after nigh forty years' service. The broken pieces and others were produced, and the only fault that could be suggested in them was, that one side was somewhat thinner cast than the other. But it appears that between thirty and forty years ago, when they were laid in position, pipes were cast horizontally, not vertically as now, and that vertical casting is an improvement on the older method, and obviates inequality. The pipe, however, was till broken a good sound pipe, and would have lasted long enough, until the roller went over it, and apparently was the best of its kind when first used. Apart from the question of depth, I cannot find any serious allegation of negligence.

On this point many witnesses were examined, several of them persons of experience and entitled to speak with some authority, on the part of the plaintiffs, besides those in their own service. Mr. Henry E. Jones, a gas-engineer of great experience, and an able man, proved an examination of the Kilmacud road injuries, and said that the main at the bridge was laid as well as circumstances would admit of. Of course the covering on the masonry of the bridge must be limited, and the witness, whilst indicating that a greater depth would have been more satisfactory, was of opinion that what was done was as good as could be, and that 9½ inches—though not an ideal depth—was adequate for ordinary traffic. I do not mean to go through the evidence of the witnesses *seriatim*. Those for the plaintiffs thought the depth adequate; those for the defendants did not.

As to the many—and respectable—witnesses called for the defence, I have to say no word of blame, hardly any of criticism. Of Mr. Collen, the engineer of the defendants, I wish to repeat what I said during the trial, that I do not remember ever having seen a scientific witness, peculiarly one personally concerned in a case, whose evidence was given with more complete candour and fairness. By this I do not mean that he is a witness for the other side. He simply told the truth; and, while not feeling bound to accept all his opinions, I accept his statements of fact without hesitation. But his evidence is open to the observation that he seems to have been under a misapprehension as to the law. I shall have to consider the law presently. Mr. Collen at one time thought that, the use of a steam-roller being lawful, the defendants had a right to work their rollers regardless of anything or anybody, save to see that they made a hard road surface. If pipes, drains, or mains, gave way, so much the worse for their owners.

The other witnesses for the defence were of opinion that the mains and pipes were not deep enough. Their evidence was that they ought to be laid about 2 feet or 2½ feet deep. This was the outcome of all their testimony. And perhaps I should not be prepared to differ from them if we were dealing with mains to be laid now, in the new, in a place where steam-rollers were in common use. But the word "ought" invites a question as to the obligation involved. It is used in reference to ordinary traffic, and that again demands a decision as to what is ordinary traffic. What is ordinary traffic to-day may not have been ordinary traffic ten years—forty years—ago.

Now these witnesses—one and all—purported to deal with ordinary traffic; but when asked what they meant by ordinary traffic they said that they included in that definition weights up to 30 tons, or at any rate up to the weight of a steam-roller of 15 tons.

Mr. Cowan, inspecting engineer to the Local Government Board, confined his evidence to a statement of what he thought should be the depth at which gas-pipes ought to be laid, so as to be safe for ordinary traffic, and he named 18 inches, though he would prefer a greater depth if attainable. He thought that "ordinary traffic" should include any traffic which might come upon Irish roads, up to 30 tons or so; and his evidence upon that basis was quite clear and consistent.

Mr. Dixon's (Rathmines and Rathgar surveyor) evidence was exactly similar; 18 inches depth, "ordinary traffic" up to 30 tons.

Mr. Middleton (Pembroke) suggests 2 feet 6 inches, but never found fractures where there is 18 inches. His view of ordinary traffic is a little vague. He first suggested 5 tons, and then seemed to think that the road should provide for 15, and said that 15 tons would be ordinary traffic.

Mr. Buckley, C.E. (Drumcondra), thought steam-rollers ordinary traffic so far as weight was concerned, and his requirement of 2 feet was on that basis, "a road to bear ordinary traffic ought to be able to bear a steam-roller."

Their whole testimony was based upon this, that ordinary traffic means something which will include steam-rollers. But this is an entire fallacy. Here is a gas company that has laid its mains many years before steam-rollers existed, or were used. The traffic when they were laid, included no such instruments. The existence of engines of 15 tons passing along the road was not dreamt of. The pipes were properly laid at the time, and are still adequate, not for all or any traffic, but for all ordinary traffic. When the first steam-roller appeared on the scene, what was the Gas Company to do? Was it to overhaul its entire system from end to end, and relay the pipes and mains a foot deeper? That would mean ruin, and even if it were done, 40 ton rollers might be next introduced (with or without legislation), and the same process might have to be repeated. Or should the company go after the rollers (11 of them it seems), and patch and repair the injury caused by them from time to time and place to place? That would be equally ruinous. Their pipes and mains were adequate for nearly forty years. There were no breakages by traffic. No collapse by decay, or by fault in the mains themselves. But for the steam-rollers the mains would be still quite adequate as they are laid. The user, for so many years, is far more convincing than any amount of opinion as to what ought now to be.

I am of opinion, as a matter of fact, that the pipes were laid, though not as deep as more modern ideas would suggest, sufficiently deep to bear the ordinary traffic of these roads, both then and now.

The Grand Jury, the road authority till recently, is entirely committed to this view. Not a single pipe could have been laid without notice to them, for section 8 of the Gas Works Clauses Act, 1847 (10 & 11 Vict. c. 15), provides that not less than three days' notice is to be given to the persons having control of the roads, or to their surveyor, before any road is opened, except in case of emergency arising from defects in the pipes, and then as soon as possible after the beginning of the work. Section 9 provides that the roads are not to be opened except under the superintendence or with the approval of the road authority. I cannot assume that these things were done illegally. If there had been any infringement of the Act of Parliament the Grand Jury would have been bound to interfere. I must assume that a public officer like the county surveyor would do his duty.

As to the law applicable to the case, it admits of no dispute. The person who uses a public highway is bound to do so with due regard to the rights and interests of others. If he employ for his own purposes a vehicle of unusual or extraordinary weight, or one carrying an unusual and extraordinary load, he does so at his peril, and that, even if the user of such a vehicle is not, in itself, a nuisance or otherwise unlawful. In the present case the user of a steam-roller cannot be said to be in itself unlawful. By the Local Government Act County Councils have power to expend money in purchasing or hiring steam-rollers. This, however, does not give them any right to use them so as to injure the property of others. They thought it did. On the 16th June, 1899, Mr. Collen wrote to the plaintiffs as follows:—

> "Dear Sir,—I am in receipt of yours of this date with copies of two letters from members of your staff with reference to the roads at Newtown Park-avenue, Leopardstown, Foxrock, etc. In reply I have to state that I am the judge of how the public road is to be restored, not any of your staff, and for your information I prescribe that:—
>
> "1. The pipes be laid at least 3 feet below the surface of the ground.
>
> "2. That such portion of the excavation as is returned to the trench be well rammed in thin layers to within, on main roads, 12 inches, and on bye-roads 6 inches, of the surface.
>
> "3. That in the case of main roads, pitching be set by hand to a depth of 6 inches.
>
> "4. That both in main and bye-roads the trench be made up to the level of the road with clean stone of approved quality, broken so that such stone shall pass in every direction through a 2-inch ring.
>
> "5. That the surface in every case be well blended with clean gravel passed through a 2½-inch screen to a depth of 2 inches.
>
> "6. That the new surface be left at the same level as that of the road adjoining before the period of maintenance begins.
>
> "7. That during the period of maintenance the surface is to be kept constantly to the level of the road by the application, if necessary, of broken stone and blending, as above described.
>
> "8. That in all cases where steam-roller surface is interfered with the new surface is to be steam-rolled, so as to give a smooth, uniform surface."

Possibly the plaintiffs also went too far on the other side when they said next day that the defendants were acting illegally in using the roller, though that may have only meant in using it so as to injure pipes lawfully placed.

There is no doubt what the law is—I shall refer to two cases only on the subject. The first is *The Gas Light and Coke Company* v. *Vestry of St. Mary Abbotts, Kensington* (1). That was a case in the Court of Appeal in England. The plaintiffs were a gas company, and the defendants were the road authority. Lindley, L.J., in giving the judgment of the Court there, says:—"The plaintiffs in this case seek an injunction to restrain the defendants from using steam-rollers so as to injure their pipes, which are laid under the surface of the roads and streets in the defendants' district." He then refers to the statutes and the facts, and continues as follows:—"It is obvious from the foregoing statement that the rights of the plaintiffs and of the defendants are, to a certain extent, conflicting. On the one hand it is plain that the plaintiffs' right to lay their pipes and have them uninjured is subordinate to the right of the public to use the streets and to have them kept in repair; on the other hand it is equally plain that the duty of the defendants to the public and their right as against the plaintiffs is to repair the streets and keep them fit for traffic. Now there is no dispute that the defendants can perform their duty without using steam-rollers of such a weight as to injure the plaintiffs' pipes" (this pointedly applies to the present case—one of the witnesses, Mr. Jones, said that the roads could be more effectively repaired without steam-rollers, but it would be more expensive—it was only a question of £ *s. d.*), "but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements, regardless of the effect on the plaintiffs' pipes. Field, J., has held that this contention cannot be supported, and we are of opinion that his decision is correct. The authorities to which he referred, and particularly *The Metropolitan Asylums District Board* v. *Hill* (2), show that an action lies for injury to property, unless such injury is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is

(1) 15 Q. B. D. 1.

(2) 6 App. Cas. 193.

so authorized. If in this case the defendants were expressly authorized by statute to use steam-rollers of such a weight as necessarily to injure the plaintiffs' pipes, the plaintiffs would have no ground of complaint. The case would then be one of *damnum absque injuria.* The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam-rollers or other machinery which could not be worked without injury to the plaintiffs' pipes; there again, although such rollers or machinery were not expressly mentioned, their use would be authorized by necessary implication, and the plaintiffs would be without redress. But unless some such statutory enactment can be shown to authorize the defendants to injure the plaintiffs' pipes, the plaintiffs are entitled to redress." The Lord Justice then considers the question whether the plaintiffs are entitled to an injunction, or to damages, and says:—"The particular instances in which injury to the plaintiffs' pipes, by the use of the steam-rollers, was clearly proved were reduced to one, but we are satisfied by the evidence that there is very considerable danger of frequent injury, and considering that the defendants claim the right to inflict it, or, in other words, claim the right to use steam-rollers of any weight, regardless of the consequences to the plaintiffs, we are of opinion that the plaintiffs are entitled to an injunction."

The only other case is *The Guardians of the Armagh Union* v. *Bell* (1), not yet reported.

The Queen's Bench Division in that case held that though the use of a traction-engine on a public road was not illegal, and indeed is expressly legalised within certain limits of weight which were not transgressed, yet, if that use caused injury to pipes properly laid under the road, the owner of the traction-engine was liable. In the course of a lucid and very careful judgment the Lord Chief Justice said:—"Mr. Hume in his ingenions argument contended that the plaintiffs brought their pipes into a position of danger—that after the Locomotive Acts were passed, which permitted a certain weight, the plaintiffs, as it were, sought the danger and must accept the risk. This contention is, in our opinion, wholly unsustainable. The plaintiffs were entitled to lay their pipes under the road, on the assumption that nothing but the ordinary traffic would pass along the road. They were not bound to regulate their action by the fact that it was possible that a traction-engine of the description before us might, at some time, or at some intervals, pass along the road. They were bound to provide only against the effects of ordinary traffic, and they were not bound to assume, or to act on the supposition, that an engine, which was in legal contemplation a nuisance, as its use was fraught with danger to property, would be brought along the road. To regulate one's action, not merely with a view to ordinary traffic, but with a view to the possible action of wrong-doers, would, in my opinion, only operate as an encouragement and licence to wrong-doers. In fact it would amount to the subordination of the exercise of legal rights to the commission of wrong." The decision was affirmed by the Court of Appeal.

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(1) Nov. 30, 1899. Since reported [1900] 2 I. R. 371.

Then if the defendants are liable at all, is it a case for an injunction? Most clearly so. The whole course of the defendants' own evidence was that if steam-rollers be ordinary traffic, the mains and pipes of the plaintiffs' system are not laid so as to be capable of supporting it uninjured. That is, if the use of the rollers is to continue without regard to anything but the convenience of the defendants, the destruction of the plaintiffs' pipes must follow.

I was pressed that an injunction would prevent the use of steam-rollers altogether. That is not so. There are vast extents of roadway though the county, where no doubt they can be employed with safety and advantage. It may be that there are places where they can be used with safety, even though gas-pipes are laid there. This I cannot of course decide. What I do decide is that their use cannot be permitted in such a manner as to injure the mains and pipes of the plaintiffs, and there will be an injunction accordingly with costs.

As to the pecuniary damage actually caused by what is complained of, I shall not direct any inquiry on that head, unless it be specially desired, and in that case I shall reserve the costs of the inquiry.

W. L.

Appeal.
1900.

A. & D. C. Gas Co. *v.* Dublin Co. Council.

June 20, 21.

The defendants appealed to the Court of Appeal (Fitz Gibbon, Walker, and Holmes, L.JJ.)

O'Shaughnessy, Q.C., *Healy, Q.C.*, and *Clancy*, for the appellants.

Ronan, Q.C., *Gordon, Q.C.*, and *Pim*, for the respondents.

Fitz Gibbon, L. J. :—

June 21.

This case is remarkably like the case of *The Gas Light and Coke Co.* v. *The Vestry of St. Mary Abbott's, Kensington* (1), both in its facts, and in the course taken in the Court below and on appeal. There are three distinct points to be considered :—(1) The question of right; (2) the proof of injury; and (3) the costs. As to the question of principle, the road authority has the right to maintain the roads under its charge by all reasonable means, having regard to what reasonable means are at the time, and to the traffic to which the roads are ordinarily subject. It would be monstrous to hold that road contractors cannot advance with the times. They are certainly entitled, and are even bound in discharge of their duty to the public, to use modern contrivances to maintain the roads in the best and cheapest manner. It would be just as reasonable to contend that roads which would have been good enough for the coaches of our grandfathers, would suffice for modern traffic, as to say that the road authorities must not use modern inventions for making roads suited to present needs. But, on the other hand, the Gas Company are entitled to protection for what they have legally done, in accordance with the conditions of the time, when they laid their existing pipes, provided due and proper care and skill were then used in laying them. Such work, when properly done, may be expected to last for a considerable number of years, and if done with reasonable care, and at reasonable expense, it is entitled to protection; but when changes take place, the Gas Company, in renewing the work, must keep up with these changes. Reasonable care must be taken not to injure by any innovation what has once been properly laid, and, on the other hand, reasonable care must be taken from time to time to adapt what is renewed, as well as what is new, to the altered conditions of the time.

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(1) 15 Q. B. D. 1.

These being the rights of the parties, what is the evidence? This portion of the case is divisible into two parts:—(1) Affirmative evidence by the Company that these pipes were broken by the steam-roller, and (2) Evidence that the breakage was not due to their not having been properly laid. It appears from the evidence given by the plaintiffs that five pipes were broken. As to one of these the defendants have admitted liability, and have paid for the damage, which occurred under exceptional circumstances, and I do not think any reliance can be placed on this instance to found an injunction.

In the second case, the Master of the Rolls has found that the injury was due to the improper way in which the meter was laid.

This leaves three injuries to be accounted for: one an injury to a main, the others to two service pipes. The injury to the main occurred where it crossed a bridge, and where there was necessarily so little cover, and the pipe was so close to the masonry of the bridge, that it was very liable to fracture. The defendants case was that the roller did not cause the injury, that it had not passed over the place for some weeks before the escape of gas was noticed, and that the pipe was broken by some heavy cart, or other vehicle. But on the evidence it is more reasonable to hold, as the Master of the Rolls has held, that the break was caused by the roller. The pipe was, in my opinion, properly laid, and having regard to its exceptional position on the bridge, exceptional care ought to have been taken by those in charge of the steam-roller not to go over it. In my opinion, the defence fails, and a cause of action is proved in this instance.

The other two cases were cases of service pipes which were taken off the top of the main, and were therefore necessarily laid nearer to the surface of the road than the main. In one of these instances, the pipe, though leading towards a house from the main, had been disconnected from the house, but it was still connected with the main, and an escape of gas was caused by its being separated from the main by some heavy weight which passed over it. The other service pipe was connected with a house, and was similarly broken. One of these pipes has been produced, and it is bent at an angle, as if a broad heavy weight with a defined edge had gone across it. It has, to my mind, the appearance of having been under the steam roller. The service pipes are shown by the photographs not to have been laid deep enough at the side of the road, but they appear to have been sufficiently well laid at the centre of the road, where they were injured, to bear the traffic to which the road was subject at the time when they were laid. They had survived the ordinary traffic for a number of years, until the roller came, and there is sufficient affirmative evidence to show that they were injured by it. There are, therefore, three cases in which the plaintiffs have proved a cause of action.

Is this sufficient to maintain an injunction? In the case of *The Gas Light and Coke Company* v. *The Vestry of St. Mary Abbott's, Kensington* (1), one single case of a broken pipe was held sufficient to prove that other similar pipes laid in a similar way were likely to be broken, and an injunction was granted to restrain the defendants from using steam-rollers in such a way as to injure the plaintiffs pipes, when laid properly. The question whether an injunction should go depends on the probability of further injury to pipes "properly laid," having due regard to the traffic reasonably to be expected at the time they were laid, and at that time steam-rollers, and vehicles of equal weight, were unknown. On this point, we decide against the defendants. But the order of the Master of the Rolls must be modified so as to make it clear that the "traffic" against which the Gas Company must take reasonable precautions when laying their pipes, will include the means reasonably used at the time for repairing and maintaining the road, as well as the passing of vehicles over the road. It will go "against using any steam-roller upon any road under which gas pipes of the plaintiffs have been laid, so as to break or injure any pipes then properly laid under such road, regard being had to what, at the time of laying such pipes, were the then ordinary traffic, and the then reasonable means of repairing and maintaining the road."

The use of a steam-roller is not to be altogether forbidden, and the Gas Company must understand that all lawful modern

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(1) 15 Q. B. D. 1.

Appeal. 1900.

A. & D. C. Gas Co. v. Dublin Co. Council.

Fitz Gibbon, L.J.

appliances and inventions for making and repairing the roads can be used wherever there are no pipes already "properly laid," and that, in the future, and also with respect to pipes laid since the introduction of the steam-roller, the Gas Company must lay their pipes at such a depth, and in such a manner, as not to be liable to injury from the use by the defendants of what is now a reasonable means of repairing roads. In the case of *The Gas Light and Coke Company* v. *The Vestry of St. Mary Abbott's, Kensington* (1), the Court of Appeal limited the protection of the injunction to pipes "properly laid." We shall make our injunction even more specific by showing that, to be "properly laid," the pipes must be laid with due regard to the present mode of repairing and maintaining the roads, which includes the reasonable use of steam-rollers which the defendants are by statute authorised to purchase. The costs in the Court below must follow the event, because the liability was established, and a decree was obtained. The costs in this Court should follow the same rule, unless the modification made by us is a modification of the substance of the decree. From the careful judgment of the Master of the Rolls, it is plain that he was dealing only with pipes "properly laid." We are merely defining the meaning of that expression. The appeal was opened on the basis that the action should be dismissed; that the main was not broken by the steam-roller at all; and that the service pipes were not properly laid, and were liable to be broken by ordinary traffic. A rough test whether the modification ought to affect the costs is to ask whether the appeal would have been brought if the modification had been offered, or made, in the Court below? The arguments with which Mr. O'Shaughnessy and Mr. Healy opened the appeal applied as much against the decree we are about to make as against the order appealed from.

We are not varying the decision of the Master of the Rolls, though we are modifying, or rather defining, the scope of the injunction, and accordingly the defendants must pay the costs of the appeal. But be it remembered that the Gas Company's original proposition that the defendants must not use a steam-roller at all, is, in our opinion, just as untenable as the counter proposition of

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(1) 15 Q. B. D. 1.

Mr. Collen, that he was entitled to work the steam-roller wherever he liked, without any regard to the existing gas pipes.

Walker and Holmes, L.JJ., concurred.

The injunction was in the following terms :—

> "An injunction against using any steam-roller upon any road under which any gas pipes of the plaintiffs have been laid, so as to break or injure any pipes then properly laid under such road, regard being had to what, at the time of laying such pipes, were the then ordinary traffic and the then reasonable means of repairing and maintaining the road."

Solicitors for the plaintiffs: *D. & T. Fitzgerald.*
Solicitor for the defendants: *William J. Shannon.*

R. D. M.

FAHEY *v.* TOBIN (1).

Appeal.
1901.
July 1.

Practice—Charging order—Equitable execution—Appointing plaintiff receiver—Stop order—Priority.

On the 16th September, 1897, A, who had recovered judgment against B, obtained an order in the Queen's Bench Division, appointing himself receiver by way of equitable execution, on entering into security before the Master, over the beneficial interest of B in a sum of £250 Consols, standing to the credit of this suit pending in the Court of the Vice-Chancellor, and, on the 17th December, 1897, A obtained a stop-order from the Vice-Chancellor, but he omitted to perfect his security until 1901.

On the 2nd November, 1897, C, another judgment creditor of B, obtained, in the Queen's Bench Division, an order charging the interest of B in the £250 Consols to the credit of the present action, and, on the 8th December, 1897, entered notice of this order in the books of the Accountant-General:—

Held (affirming the decision of the Vice-Chancellor), that C was entitled to be paid his debt, out of the share of B in the Consols, in priority to A.

On the 13th August, 1897, Stephen Dowling obtained a judgment against James Ryan for £50 and £5 11*s.* costs, on

(1) Before Lord Ashbourne, C., and FitzGibbon, L.J.

foot of which he issued execution, and on the 23rd August, 1897, there was a return of *nulla bona*. It appeared that James Ryan was entitled, as one of the next-of-kin of Timothy Ryan, to a sum of about £90, as his share of the assets. Timothy Ryan's assets were being administered in the Vice-Chancellor's Court in this action of *Fahey* v. *Tobin*, and there was standing to the credit of this suit a sum of £250 11*s*. 6*d*. consols; there was also a sum of £360 in the hands of the defendant as outstanding assets, and there were also some further moneys due to the estate, which were being ascertained in the course of the administration.

On the 16th September, 1897, Dowling obtained an order from the Queen's Bench Division, appointing himself receiver by way of equitable execution over the beneficial interest of James Ryan in the said sum of £250 11*s*. 6*d*. consols, on entering into security before the Master of the Division, "serving this order on the defendant forthwith." On the 17th December, 1897, Dowling obtained from the Vice-Chancellor a stop order against payment of the share of James Ryan of the funds in *Fahey* v. *Tobin*, without notice to Ryan; but he did not perfect his security until the 13th June, 1901.

On the 2nd November, 1897, James Doyle obtained a judgment against James Ryan for £158 7*s*. 6*d*. and £2 1*s*. 11*d*. costs, and on the 24th November, 1897, he obtained a charging order from the Queen's Bench Division. That order recited the judgment, and proceeded:—It further appearing that the said defendant has an interest in the estate of Timothy Ryan deceased, now being administered before the Vice-Chancellor of whom the said James Ryan is one of the next-of-kin, and which estate consists of the sum of £250 11*s*. 6*d*. new consols, now in Court, and of £360 cash in the hands of the defendant in said action and of other estate at present being ascertained . . . and that the said James Ryan's share consists of one-fifth of the said estate of Timothy Ryan deceased, as one of his next-of-kin, and also of shares as next-of-kin of William Ryan, another next-of-kin of the said Timothy Ryan, who died pending the suit, and of Patrick Ryan, another of the said next-of-kin, who is believed to be dead: It is ordered that the interest of the said defendant in the said sum of £250 11*s.* 6*d.*, new consols, in Court to the credit of the aforesaid Chancery suit, do stand attached to the extent of and to answer in part payment of plaintiff's said judgment debt in this action until further order. And it was further ordered that the plaintiff be appointed receiver by way of equitable execution over the beneficial interest of the defendant in the said sum of £360 cash in the hands of the defendant in the aforesaid Chancery suit, to the extent of and to answer in payment of the balance of plaintiff's judgment debt in this action after payment of the above charge on defendant's interest in the said sum of £250 11*s.* 6*d.*, new consols, upon entering into security before the Master of this Division. . . . Serving this order upon the Accountant-General of the High Court of Justice in Ireland, upon the Chief Clerk of the Vice-Chancellor's Court, upon Mary Tobin the defendant, and upon the defendant James Ryan. Notice of this order was entered on the books of the Accountant-General on the 8th December, 1897.

On the 30th April, 1901, the Vice-Chancellor made an order directing payment to James Doyle of the distributive share of James Ryan in the assets of Timothy Ryan, in priority to the claim of Stephen Dowling. On the 3rd June, 1901, Dowling applied to the Vice-Chancellor to vary this order, and the application was refused.

His Lordship delivered judgment as follows :—

The Vice-Chancellor :—

This is a question of priority, arising in reference to the claims of two judgment creditors. The first point raised deals with an order of the Queen's Bench Division, for the appointment of a receiver by way of equitable execution, which one of these parties first obtained, which is in the usual form, and provided that the plaintiff should be appointed receiver on entering into security before the Master. The effect of this was to make the entering into security a condition precedent to the receiver being validly constituted. But that condition has never been complied with, and therefore the case in this respect is quite in accordance with the decision in *Edwards* v. *Edwards* (1). Then comes the charging order, which was obtained by the second creditor in the ordinary way, and which operated as a charge without more, when notice of it was lodged with the Accountant-General.

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(1) 2 Ch. D. 291.

As to the "stop" order, obtained by the first creditor, there is nothing new as to the effect of such an order. I have frequently had occasion to point out the different effects of a charging order, and a stop order. A charging order has the same effect as if the charge were created by deed, but notice to the Accountant-General is necessary to give priority. A "stop" order has no such effect. The only effect of it is, that it prevents the Accountant-General from dealing in any way with the fund, unless and until notice is given to the party who has got the "stop" order, and it also precludes a party, having a charging order on the fund or otherwise interested in it, from any transaction affecting it behind the back of the party, who has the "stop" order. The latter must have an intimation of any such proposed transaction from the Accountant-General, enabling him to come in and take the necessary steps to protect whatever rights he may have.

I am, therefore, of opinion that here the charging order takes precedence over the order for a receiver by way of equitable execution, and the "stop" order obtained by the first creditor.

Dowling appealed.

O'Connor, K.C., and *Patrick Lynch*, for the appellant:—

Once a receiver order is made, the owner cannot interfere with the property; it stops the Statute of Limitations and everything else. The appointment of the receiver relates back to the date of the appointment, although some time may elapse until he gets his security: *Ex parte Evans* (1). The appointment of the receiver was a delivery of the lands in execution, although the security was not perfected: *Levasseur* v. *Mason* (2); *Edwards* v. *Edwards* (3).

Once the receiver was appointed by Dowling, that deprived the judgment debtor of the power to charge the fund in favour of anyone. The order obtained by the respondent affected only the interest which the debtor had in the fund at the time, *i.e.* the amount subject to the charging order obtained by the appellant.

(1) 13 Ch. D. 252. (2) [1891] 2 Q. B. 73. (3) 2 Ch. D. 291.

Appeal.
1901.

Fahey
v.
Tobin.

Molony, *K.C.*, and *C. Doyle*, for the respondent:—

The appointment of a receiver dates not from the order appointing him, but from the date of his perfecting his security, but if no security is required, the appointment is complete from the date of the order. If the receiver had entered into possession his title would have been complete: *Morrison* v. *Skerne Ironworks Company* (1). Our order was brought to the notice of the Accountant-General before the 8th December, 1897, so that the £250 consols was attached by the order of 24th November, 1897. A charging order may be made by a Judge of the Queen's Bench upon cash standing to the credit of the debtor in the Chancery Division in the name of the Paymaster-General: *Brereton* v. *Edwards* (2). Then if notice is given to the Paymaster-General, the title is complete.

Lord Ashbourne, C.:—

This case raises a short and not very difficult point in reference to two orders made by the same Judge. A stop order had been made by the Vice-Chancellor, on the application of a man named Dowling, against a fund in Court, part of the assets of Timothy Ryan. When, however, the facts were brought to his notice subsequently by Doyle, another creditor, he made an order on the 30th April, 1901, directing that payment should be made to the latter, out of the share coming to James Ryan from the assets of Timothy Ryan. Dowling, not being satisfied with this, has appealed, and says that he is entitled to priority on the facts and circumstances of the case. What are they? It appears that on the 16th September, 1897, Dowling, who was a judgment-creditor of James Ryan, obtained an order from the Queen's Bench Division, appointing himself receiver by way of equitable execution over a sum of £250 consols, standing in the Accountant-General's books to the credit of this present action, and that order stated that he had obtained a judgment, directed that he should be appointed receiver by way of equitable execution, on entering into security before the Master, and that he should account to the

(1) 60 L. J. (N. S.) 588.

(2) 21 Q. B. D. 488.

Master as he should appoint. It did not declare his rights, it only appointed him receiver on entering into security, and directed him to account, and it does not show that on the account there would be anything coming to him. Not being satisfied with that, he proceeded to somewhat strengthen his position by getting a stop-order from the Vice-Chancellor, on the 17th December, 1897, against this fund. It did not appear that he had any charge on this sum of £250 consols; no knowledge of his claim to the consols was brought to the notice of the Accountant-General, but he was so satisfied with the orders he had got that it was not until the 13th June of the present year, after the appeal had been lodged, that he thought of perfecting his security. He now claims priority in the payment of his debt over the respondent, who got a different order on a different date, which did not require any further support.

On the 24th November, 1897, the respondent obtained an order from the Queen's Bench Division, which, after reciting that Doyle had recovered judgment against James Ryan for £160, and that James Ryan had an interest in the assets of Timothy Ryan, consisting of £250 consols in Court, £360 cash not in Court, and also of other sums, proceeded as follows:—"It is ordered that the interest of the said defendant in the said sum of £250 11*s.* 6*d.*, new consols in Court, to the credit of the aforesaid Chancery suit, do stand attached to the extent of and to answer in part payment of plaintiff's said judgment debt in this action until further order," and then Doyle is appointed receiver, by way of equitable execution, over the £360 cash and the other sums, forming the assets of Timothy Ryan. But that part of the order is gone by the board because he did not perfect his security, and his entire reliance rests on the fact that the order of the Queen's Bench directed that the sum of £250 consols "do stand attached," which, as his counsel, Mr. Molony and Mr. Doyle, contend, entitles him to priority over Mr. O'Connor's client, and also that this order was entered in the books of the Accountant-General. I think that they are right. If the appellant, after he had obtained the receiver order on the 16th September, 1897, had been active, and had perfected his security at once, it might have been different: *Edwards*

v. *Edwards* (1). But except for getting the stop order on the 17th December, he did nothing until the 13th June of the present year, and he gave no notice to the Accountant-General. Mr. Molony's client, on the other hand, had placed the order to attach on the books of the Accountant-General on the 8th December, and the only way in which the Accountant-General can ascertain who is the right person to be paid, is from the priority in order of time of the notices given to him. In my opinion the order of the Vice-Chancellor should be affirmed, and the appeal dismissed with costs.

Fitz Gibbon, L.J. :—

I agree. The case is of interest on a question of practice. I assume that the order obtained from Boyd, J., on September 16th, 1897, was right in form, and I do not express any opinion on that subject, as I doubt that an order appointing the plaintiff to be a receiver by way of equitable execution was the right form of order, the fund being in Court. Equitable execution is a sort of *fieri facias cy près*, and when a fund is in Court, I think that a charging order by the Court which has the fund, followed up by a motion for payment, on notice to the proper parties, is a more appropriate proceeding.

The question of substance is as to the effect of the Queen's Bench order of September 16, 1897, upon the consols which were then standing in the name of the Acountant-General to the credit of the Chancery suit to administer the assets of Timothy Ryan. James Ryan was only one of the next-of-kin, and had no legal, specific, or even ascertained interest in the fund. The order appointed Dowling receiver, by way of equitable execution, upon his entering into security; according to its terms, it did not operate upon the fund until security was given. I have no doubt that when such an order has been made, and is afterwards made operative by perfecting security, it takes effect by relation back to its date, but such relation must be subject to anything that has occurred, and has taken complete effect, in the meantime.

There are three dates of importance in Dowling's procedure—1.

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(1) 2 Ch. D. 291.

Appeal. 1901.

FAHEY v. TOBIN.

Fitz Gibbon, L.J.

September 16, 1897, when Boyd, J., appointed Dowling receiver, on giving security; 2. December 17, 1897, when the Vice-Chancellor, by his "stop order," directed that no dealing should take place with regard to James Ryan's share in the consols without notice to Dowling; 3. June 13, 1901, when Dowling perfected his security as required by the order of September 16, 1897. In my opinion, until that was done, any legitimate operation that could be completely performed on the fund would bind the fund notwithstanding the inchoate or incomplete order of Boyd, J. The ordinary equitable order of priority, in the case of money in the hands of a stakeholder, is that in which notices of attachment reach the holder of the fund—in this case the Accountant-General.

Doyle's procedure was this—on Nov. 24, 1897, he got an order from the Queen's Bench, expressly charging his demand upon James Ryan's interest in this sum of consols. This order was made by the same authority which had already made the order of Sept. 16, 1897. Notice of Doyle's order of charge was given, and it was duly entered on the books of the Accountant-General on December 8, 1897, before Dowling had got his "stop order," and long before he took the step necessary to make his receivership effective. A charging order having been got by Doyle, and being the right form of order, and notice of that order having been given to the Accountant-General, and accepted by him, it appears to me that, in principle, the priority of the complete charge thus obtained by Doyle cannot be affected by the fact that another person, Dowling, had previously got an order enabling him to seize the fund upon his doing an act which he omitted to do.

The cases to be reconciled are *Edwards* v. *Edwards* (1), which accords with the principle which I have stated, and *Re Watkins* (2). I do not think that they conflict. *Edwards* v. *Edwards* (1) related to *chattels*, and it decided that chattels remain liable to execution after the appointment, "upon giving security," of a receiver by way of equitable execution, until the security is given. In other words it decided that chattels are not taken in execution merely by the conditional appointment of a receiver, until the condition is fulfilled. Until this is done, it is not a contempt of

(1) 2 Ch. D. 291. (2) 13 Ch. D. 252.

Appeal.
1901.
Fahey
v.
Tobin.
Fitz Gibbon, L.J.

Court if another person executes a writ, and seizes the property. It seems to me that this must equally apply where another person has got a regular charging order against a fund in Court, and has duly entered that order in the books of the Accountant-General. This is a complete equitable transfer of the fund to the chargeant *pro tanto.*

Watkin's Case (1) turned on the necessity for suing out an *elegit* in order to attach an equitable interest in *land.* An *elegit* was held to be unnecessary, because the appointment of the receiver operated as an immediate delivery of the land in execution, attaching the property *eo instanti*, and the subsequent giving of the security merely completed the appointment of the officer who was to give effect to the order already made. James, L.J., distinguished *Edwards* v. *Edwards* (2), and recognised it as an authority for giving priority to an execution creditor who seizes chattels over a receiver who has been previously appointed "on giving security," but who has not completed his security before the execution. Here I am of opinion that Doyle had got a complete charge by virtue of the order of November 24, 1897, followed by the notice of December, 1897, acted on by the Accountant-General, before Dowling had done any act which charged his demand upon the fund in the hand of the Accountant-General, and therefore that Doyle cannot now be displaced. In my judgment the order of the Vice-Chancellor was right, and the appeal should be dismissed with costs.

Solicitor for the appellant: *R. Macnamara.*
Solicitor for the respondent: *James Doyle.*

R. D. M.

(1) 13 Ch. D. 252. (2) 2 Ch. D. 291.

Appeal.
1901.
June 3.

IN RE KANE AND THE LOCAL REGISTRATION OF TITLE ACT (1).

Judgment mortgage—Affidavit—More than one plaintiff—Affidavit sworn by one plaintiff only—13 & 14 *Vict. c.* 29.

Judgment was recovered in an action at law by J. I. and R. J. I. against G. K. The affidavit filed to register the judgment as a mortgage was sworn by R. J. I. only, in which he stated that he recovered the judgment, that the name and title of the action was J. I. and R. J. I., plaintiffs, and G. K., defendant, and that he was one of the plaintiffs, and it gave the place of abode and trade of R. J. I. The plaintiffs were brothers, who carried on the business of farmers, and, as was stated, at the same place at the date of the judgment:

Held, that the affidavit was a sufficient compliance with the statute.

APPEAL from the order of Madden, J., dated the 16th April, 1901, whereby he refused an application made by Sir John Barr Johnston to remove from the register a judgment for the sum of £48 5*s.* 3*d.*, entered up by John Irwin and Robert J. Irwin, against the owner and registered as a mortgage against the lands on the 10th January, 1899 (being burden No. 6), on the ground that the affidavit filed to register the judgment as a mortgage was defective as having been sworn by one of the plaintiffs only, and as stating the name, address, and occupation of one plaintiff only.

On the 15th December, 1898, John Irwin and Robert James Irwin obtained judgment against George Knox in the Queen's Bench Division, Ireland, for £42 9*s.* 3*d.*, and £5 16*s.*, making together the sum of £48 5*s.* 3*d.* This judgment was registered as a mortgage on the 10th January, 1899, against the interest of George Knox in a farm of land in the townland of Longfield, barony of Tirkeeran, and county of Londonderry. The affidavit filed to register the judgment as a mortgage, was sworn by Robert James Irwin, one of the plaintiffs only, and in it he swore that he recovered the judgment; that the name and title of the action was John Irwin and Robert James Irwin, plaintiffs, and George Knox, defendant; that he was one of the plaintiffs; that his place of abode was Shanreagh, Limavady, county Londonderry, and that his trade or profession was a farmer. It then gave the name, place of abode, and trade of the defendant, and that he was possessed of the lands in fee-simple, subject to an annuity, payable to the Land Commission. It concluded by stating that the judgment was still in force, "and that the sum of £41 5*s.* 3*d.* still remains justly due, and owing to me on foot thereof, besides interest from the 15th day of December, 1898."

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(1) Before LORD ASHBOURNE, C., FITZGIBBON, WALKER, and HOLMES, L. JJ.

The note at the foot of it stated that "This affidavit is filed on behalf of the plaintiffs by Todd & Martin, solicitors."

On the 18th October, 1899, this judgment was entered up as a charge against the lands by Robert James Irwin, and it appeared in the certificate of charge as entered by him alone. Subsequently this was altered by the Irwins, by inserting the name of John Irwin, so that the judgment as stated at charge No. 6 appeared in the names of both John Irwin and Robert James Irwin.

Sir John Barr Johnston was registered as the owner of a charge against the lands on the 15th August, 1899, for the sum of £20 13*s.* 10*d.*, on foot of a judgment entered on the 21st January, 1899. This was placed on the register as *puisne* to the Irwins' charge.

An affidavit filed by Robert James Irwin stated that, at the date of the judgment, he and his brother lived together, and carried on business in partnership as farmers, and that at that time their title, trade, and address were the same.

John Leech, for the appellant:—

The registration of a judgment as a mortgage by one plaintiff is a bad registration of a judgment obtained by two joint plaintiffs; because it does not comply with sect. 6 of the Judgment Mortgage Act. There is a variance between the affidavit and the judgment. The requirements of sect. 6 of the Judgment Mortgage Act must be complied with strictly: *Fitz Gerald's Estate* (1). The present question was mooted in *Gray's Estate* (2); but Lynch, J., decided the case on another ground. In *Ulster Bank's Estate* (3), one of four executors made the affidavit, and it was held good. In *Spaddacini* v. *Treacy* (1), Porter, M. R., followed the decision of Lynch, J., in the *Ulster Bank Case* (2), though his own opinion would have been the other way.

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(1) 11 Ir. Ch. Rep. 278. (2) I. R. 1 Eq. 265. (3) I. R. 3 Eq. 264.

Wylie, K.C., and *A. Todd*, for the respondent :—

The affidavit is a sufficient compliance with the statute, and follows the practice which has been in existence for over thirty years. Statements in the title of a judgment mortgage affidavit may be incorporated by reference in the affidavit itself: *Re Smith* v. *Ross* (3); *Ulster Bank's Estate* (2); *Spaddacini* v. *Treacy* (1).

LORD ASHBOURNE, C. :

This is an interesting discussion raised on the construction of the Judgment Mortgage Act, and on the practice in connection with it, which has been followed for over a legal generation. The question arises, like many previous questions, upon sect. 6 of the Judgment Mortgage Act, which provides that when a creditor has obtained a judgment against a person possessed of lands, and is desirous of converting it into a charge against those lands, he is to swear an affidavit, and what should be the contents of this affidavit is the question. The affidavit is to state, among other matters, "the names and usual or last known place of abode, and the title, trade, or profession, of the plaintiff and the defendant." It has been contended by Mr. Leech that inasmuch as there were two plaintiffs in this case, and the affidavit that was sworn to found the judgment mortgage was only sworn by one of them, who gave his own residence and description, and said nothing about the other plaintiff, we should hold the registration invalid. In other words that "the plaintiff," in that clause in sect. 6, means all the plaintiffs, and it will not suffice for one plaintiff to swear the affidavit unless he goes on to deal with the other plaintiffs, and to state the same particulars as to them. I hope that I am not doing any injustice to Mr. Leech's argument when I state it thus shortly.

(1) 21 L. R. Ir. 553. (2) I. R. 3 Eq. 264. (3) 11 Ir. Ch. R. 397.

There are few Acts of Parliament, which have changed the law so much, or which have given to the legal profession so much occupation, or so much scope for developing their talents. Every line of this 6th section, indeed every word and syllable of it, has been threshed out backwards and forwards, and the point raised in this case is not a novel one, although it is the first time it has come before the Court of Appeal. In consequence of some defects which occurred in practice, the Legislature had to apply itself to passing an amending Act, 21 & 22 Vict. c. 105, by which it sanctioned a supplemental affidavit being filed in certain cases, and it also enacted that no registration of any judgment should be deemed invalid by reason of the affidavit, directed to be filed, being made by one judgment creditor only. This indicates that the Legislature thought it right to arm one person with the right to come in and make his case, assuming that he would represent the others, and prevent the possibility of anyone else being required to do so. In the present case the affidavit was sworn by one of the two plaintiffs, who sets out the date and the amount of the judgment, and the name of the other plaintiff, but only gives his own residence, occupation, and position. It is worthy of attention that his position as to the other plaintiff is made abundantly plain by the statement at the foot of the affidavit: "This affidavit is filed on behalf of the *plaintiffs* by Todd and Martin, solicitors." So the case is that of one plaintiff swearing the affidavit, as he was entitled to do, and his solicitor saying it was filed on behalf of both plaintiffs.

The object of giving these particulars, I should think probably was for the purpose of enabling the defendant to probe the question of the plaintiff's identity, if he was disposed to do so. Was there anything in the course adopted by the judgment creditor to mislead, or to place the appellant in a false position, or false security? There is nothing, according to my view, which could embarrass the appellant, or which could have misled him.

The question is not a novel one; it has been before the Courts since 1867—thirty-four years ago; Mr. Wylie said, since 1860—and we have had these authorities cited to the Court. The first was *Gray's Estate* (1), decided by Lynch, J., a judge of great clearness, in which he expressed the opinion, leading up to what he afterwards decided, that the affidavit of one plaintiff would suffice. But there never was a Judge who regarded with more horror the attempts to defeat the claims of *bona fide* creditors on technical grounds. In the case of *The Ulster Bank's Estate* (2), he distinctly decided that the affidavit of one plaintiff was a sufficient compliance with the statute; the words of the statute being "the plaintiff," if one plaintiff, out of several, filed the affidavit to register the judgment as a mortgage, and gave his own description and residence, that would be enough. Whatever may have been the reasoning, that was his clear conclusion. When the question came before the Master of the Rolls in *Spaddacini* v. *Treacy* (3), he followed the decision of Lynch, J., stating that if the point was a *res nova*, he might have been disposed to come to a different conclusion, but having been decided by Lynch, J., a Judge possessed of co-ordinate jurisdiction, he followed his decision. Then when this came before Madden, J., he arrived at the same conclusion, and we have been told that he expressed his approval of Judge Lynch's decision. Mr. Justice Madden is an authority whose decision is entitled to special weight on this matter, not only as a Judge, but also because he studied the subject specially when at the bar, and he is the author of the standard work dealing with the Registration of Deeds and Judgment Mortgages.

There has, therefore, been an unbroken course of practice for thirty-four years, which we are asked by this appeal to disregard, and to arrive at a different conclusion. But independently of the reported cases, the question must have arisen over and over again, and thousands of pounds must have been paid on the faith of the existing practice being the law. However I might scrutinize the question, if raised for the first time, I do not feel in the slightest degree anxious to say that I would not arrive at the same conclusion. I am satisfied to leave the decision as I find it, and in my opinion the decision of Madden, J., should be affirmed, and the appeal dismissed with costs.

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(1) I. R. 1 Eq. 265. (2) I. R. 3 Eq. 264. (3) 21 L. R. Ir. 553.

Fitz Gibbon, L.J. :—

The state of the authorities appears to be this—In 1867, in *Gray's Estate* (1), the question was raised before Lynch, J., whether, when there are several plaintiffs, an affidavit stating the abode of one only is not enough to satisfy the requirement of the statute, which "only speaks of one plaintiff, not several." He seems to have been ready "to meet a technical objection by a technical construction of the Act," but he found another way out of the difficulty, by holding that the affidavit of the one plaintiff in that case contained substantially the statement of the residence of both. In the *Ulster Bank Case* (2), the affidavit was made by one of four executors, who gave only his own title, and no description was given of the other three, save as "executors." There Lynch, J., unequivocally held that the object of the Act was "substantially" met; he held the registration good; and he said that it might entail great hardship, if several executors recovered a judgment, if it could not be registered until the executor (deponent) "had learned, so as to swear to it, the title of each of the other executors." The defect relied on there was quite as great as that relied on here, for the description of three of the plaintiffs did not appear at all, and the description of the deponent, who registered the judgment, appeared incidentally in the affidavit.

In *Spaddicini* v. *Treacy* (3) the Master of the Rolls followed that decision, and though he gave reasons for a contrary conclusion, he said that he *must* treat the decision as applying to his case, and he felt "certainly no reluctance to act upon it." There was no appeal in any of these cases; though there do not appear to have been any circumstances of poverty, or any other reason except acquiescence, to prevent an appeal. We, therefore, have a course of decision, followed by a course of practice, from 1867 to 1901, thirty-four years. This is now fortified by the approval of Madden, J., who is charged with the administration of the system of Local Registration of Title, and no one at the bar in our time was so high an authority on the subject of Registration, for he had made it a special study, and wrote the recognised text-book upon it. In this case he has not only followed the Master of the Rolls, but we have

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(1) I. R. 1 Eq. 265. (2) I. R. 3 Eq. 264. (3) 21 L. R. Ir. 553.

Appeal. 1901.

In re KANE.

Fitz Gibbon, L. J.

been told that he has expressed his approval of Judge Lynch's decision. That decision ought to be upheld, after having stood, and been acted upon, for so many years, unless there is such manifest error in it as to put it beyond our jurisdiction to affirm it. Having arrived at the conclusion that it may be supported upon reasonable grounds, I hold that if a different course of practice is now to be established, this must be done by the House of Lords, or by the Legislature, and I do not think that it is our duty, or that it would even be right, to consider the construction of the statute as *res nova*, whatever might be our own view of it. As to the reasonableness of the decision, I look at two things—(i) The official form makes the omission inevitable, unless a special paragraph, for which no space is left, is inserted; (ii) The Act of Parliament, by using the word "plaintiff" in the singular, has caused all the trouble. It provides that the affidavit shall state the names, place of abode, title, &c., "*of the plaintiff* (if there be such), and of *the defendant or person whose estate is intended to be affected* by the registration." What if there are several defendants? If there be only one defendant who has any estate to be affected, surely, under these words, it can hardly lie in his mouth to say that the registration against him is bad, because the affidavit does not state all these particulars about a number of other people who are defendants, but were not "intended to be affected by the registration." Yet, so far as the strict language is concerned, the statement as to "*the* plaintiff," and as to "*the* defendant," is required in similar terms, and the case of one of several plaintiffs may be satisfied by stating the required particulars about the one who registers the judgment and makes the affidavit, as reasonably as the case of one of several defendants is satisfied by stating what is required as to the one whose property is to be affected. But while I think that there was a great deal to be said for the judgment of Lynch, J., from the beginning, my refusal to reverse it now rests on its having been followed by the Master of the Rolls, thirteen years ago, acted on ever since it was given, and now adopted and approved by Madden, J.

Appeal.
1901.
In re
Kane.

Walker, L.J. :—

I concur. I am not prepared to say what my view would have been if the question had arisen now for the first time. I can quite understand the conclusion at which Lynch, J., arrived in *In re Gray's Estate* (1). He thought that if there were two plaintiffs, and only one of them made the affidavit, as he was in fact a creditor, and gave the address of both, that would be enough to satisfy all the provisions of the statute. Unless I was clearly of opinion that that construction was not possible, then since there has been a continuous practice for thirty-four years, I think it should not now be departed from. It has been approved of by the Master of the Rolls in *Spaddacini* v. *Treacy* (2), and sanctioned by Madden, J., in the present case. None of the cases, until the present, have been taken to the Court of Appeal, and in the meantime large sums of money have been paid out on the strength of it. I am satisfied that it is a possible construction of the statute, and having been adopted now for so long, I think we ought not to alter it.

Holmes, L.J. :—

When judgment mortgages came into existence in the year 1850, the statute creating them provided that the registering affidavit should, amongst other things, state "the names and the usual or last known place of abode, and the title, trade, or profession of the plaintiff (if there be such), and of the defendant." It is to be noted that although the Act 13 Vict. c. 21, which enacts that in all statutes words importing the singular number shall be taken to include the plural, received the Royal assent before 13 & 14 Vict. c. 29 (the Judgment Mortgage Act), the first mentioned Act, was to take effect from and after the commencement of the next Session of Parliament and seems to apply only to statutes enacted thereafter. Under these circumstances, I think that the words I have quoted are susceptible of three constructions—either, 1, that a judgment in an action in which there are more than one plaintiff or defendant, could not be registered as a mortgage; 2, that the words "*the* plaintiff and defendant" are to be read

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(1) I. R. 1 Eq. 265.

(2) 21 L. R. Ir. 553.

"*a* plaintiff and defendant," and that it is sufficient to give the required particulars of one of them; or 3, that the words, "the plaintiff and defendant" include all the plaintiffs and defendants, and that the prescribed particulars should be set forth in regard to each.

The first of these constructions is plainly repugnant to the general policy of the statute and must be rejected; but neither of the other two is unreasonable, and I am unable to gather from this Act an object or intention which would lead me to prefer the one to the other.

If this were the first time a Court had been called on to decide the point, I am not sure that I should not prefer the third; but more than thirty years ago, the second received judicial sanction in a case that has been followed and acted on since. This construction has been accepted by the legal profession; titles depend on it; money has changed hands on faith of it; and the form under the Registration of Title Act is in accordance with it. The question might have been brought for decision to this Court long ago; but no litigant has thought fit to do so; and although long persistence in an alleged error does not legalise error if it exists, it is a strong argument against the contention that there has been error.

If the received construction were absurd or unnatural, I should not accept it; but it being, as I have said, reasonable, I am prepared to adopt it.

Solicitor for the appellant: *R. A. Wilson.*
Solicitors for the respondent: *Todd & Martin.*

R. D. M.

WHITE *v.* BAGOT.

H. L.
1901.
June 18, 20.
August 3.

Mortgage—Priority—Compromise of litigation in Probate Court—Costs of suit —Mortgage for costs.

Appeal by the petitioner C. White from an order of the Court of Appeal in Ireland, reported [1900] 1 I. R. 496, *sub. nom. In re Bagot's Estate.*

Haldane, K.C., and *Assheton Cross* (both of the English bar), (with them *John Leech*), for the appellant.

Jellett, K.C., and *Gerald Fitz Gibbon* (with them *F. E. Colt*, of the English bar), for the respondent, W. H. Neville Bagot.

The House of Lords (the Earl of Halsbury, L.C., and Lords Macnaghten, Shand, Brampton, and Lindley) reversed the order of the Court below, and restored the judgment of Ross, J., [1900] 1 I. R., pp. 504–510 (1).

Solicitors for the appellant: *Vallance & Vallance* for *Fry & Son.*
Solicitors for the respondent: *Eland, Nettleship, & Batt*, for *Moore, Keily, & Lloyd.*

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(1) *Ex rel., Mr. John Leech.* See paragraph stating result of appeal, New Irish Jurist, vol. 1, p. 307.

H. L.
1901.
Nov. 12 14.

ECONOMIC LIFE ASSURANCE SOCIETY *v.* USBORNE AND OTHERS.

Mortgage—Priority—Judgment—Merger—Interest.

Appeal from the decision of the Court of Appeal in Ireland, reported [1900] 1 I. R. 103, *sub. nom. Usborne* v. *Limerick Markets Trustees.*

Haldane, K.C. (of the English bar), *Jellett, K.C.*, and *Lyttleton Chubb* (of the English bar), for the appellants, the Economic Life Assurance Society.

Ronan, K.C., and *Morphy*, for the respondents Usborne and the National Bank.

C. A. O'Connor, K.C., and *C. F. Doyle*, for the respondents, the Limerick Corporation.

The House of Lords (the Earl of Halsbury, L.C., and Lords Shand, Davey, and Brampton) affirmed the decision of the Court of Appeal in Ireland on the question of priority, without prejudice to the rights of the Limerick Corporation, who had not intervened in the proceedings in the Irish Courts; and reversed the decision below as to the rate of interest, holding that the merger effected by the judgment obtained in the Common Law Division only affected proceedings taken under that judgment, and did not prevent the mortgagees from independently having recourse to their security for the payment of principal and interest at the rate specified in the mortgage (1).

Solicitors for the appellants: *Tatham, Lousada & Co.*, for *Barrington & Son.*

Solicitors for the respondents Usborne and the National Bank: *Cobb*, for *O'Connell & Son* and *W. H. Dunne.*

Solicitors for the Limerick Corporation: *Batten, Proffit & Scott*, for *John Dundon.*

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(1) *Ex rel., Mr. C. F. Doyle.*

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ADEMPTION—*Will—Construction—Receipt of residuary estate by testatrix—Payment into bank—Exercise of control over fund—Partial ademption.*] By a codicil to her will testatrix devised and bequeathed "all monies and property devolving upon or receivable by me under the will of *W*" to *A* and *B* upon trust to pay certain legacies. During her lifetime testatrix received a sum of £693 in respect of the residuary estate of *W*, and thereupon opened an account with a bank and lodged the money to her own credit. She from time to time drew out sums of money for the payment of the testamentary expenses of *W*, for making gifts to persons (some of whom were beneficiaries under the trust in her codicil), and for other purposes of her own. Previous to this lodgment of £693 testatrix had no banking account. After the payments to her there remained as balance to her credit a sum of £149. Subsequently a further sum of £151 was received by testatrix in respect of the residuary estate of *W*, and this was lodged by her in bank, making in all the sum of £300, which remained intact to the credit of her account at the date of her death:—*Held*, that the bequest to *A* and *B* was adeemed only as regards money paid out of bank to testatrix, but that as regards the sum of £300 remaining intact at her death to the credit of her account there was no ademption, and that the same passed under the bequest in her codicil. *Toole* v. *Hamilton* [M. R. 383

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BANKER—*Bankers' Act—Banker or money-lender — Receipt of money on deposit-receipt—Discount of bills — No cheque-books or current accounts—No issue of notes—Registration of deeds*—33 *Geo.* 2, *c.* 14 (*Ir.*)] Down to the year 1879 *P. S.* carried on business as a banker, or money-lender, in the towns of *D*, *A*, and *C*, in the county of Tyrone, in his own name. He had no other business. After that he carried it on with his son *M. S.* as *P. & M. S.* There was not any deed of partnership. In 1890 *P. S* conveyed all his property to *M. S.*, who, since that time, was the sole owner of the business. The premises where the business was carried on consisted of two rooms in a house in each of the towns of *D*, *A*, and *C*, one of which was occupied by *S.*, and the other by his clerk. He attended one day in each week in each of these places. The course of business was this:—Money was lent on promissory notes, payable in twelve weeks, with interest at the rate of ½*d.* in the £1 per week. Advances were also made on mortgages. The firm had been in the habit of receiving large sums of money on deposit, for which they gave promissory notes, payable three months after date. In 1893 they substituted deposit receipts similar in form to those issued by banks, and the amount of money received on these was very large. They also lent small sums, up to £5, without taking any security. They cashed "crop notes" and small American drafts. The books kept by *S.* were of the most primitive sort, and not such as were usually kept by bankers. *S.* did not

BANKER—*continued.*
issue notes, cheques, pass-books, letters of credit, or bills on foreign or British banks, and there were not any current accounts kept with the firm. Evidence was given to show that the establishment kept by *S.* was commonly known as *S.'s* bank, and the officials of the Bank of Ireland had also called the firm bankers. *M. S.* obtained advances from the Bank of Ireland, with whom he had dedeposited by way of equitable mortgage the title deeds of property to secure the advances. These deposits were not accompanied by any memorandum in writing, and were therefore incapable of registration. By indenture, dated the 14th January, 1899, *M. S.* conveyed all his property to trustees upon trust to realise and divide the proceeds among his creditors:—*Held* (reversing the decision of Ross, J.), that *M. S.* was a banker within the meaning of 33 Geo. 2, c. 14 (Ir.), and that the mortgages created by deposit of title deeds, not having been registered, were levelled. *In re Shields' Estate; Governor and Company of Bank of Ireland, Petitioners* - - - App. 172

2. —— *Customer—Executor paying trust money into credit of his own account—Liability of bank.*] *A* lodged to the credit of his private account at a bank moneys which belonged to him and *B*, as executors of *C*. The bank had notice that the moneys so lodged were trust moneys, but had no notice that *A* intended to commit a breach of trust, and placed the moneys to the credit of *A's* account in the ordinary way. *A* afterwards became insolvent, and his account was overdrawn. *B* brought an action against the bank and *A*, to have it declared that the bank were trustees of the moneys so lodged on behalf of *B* and *A*, as executors of *C*:—*Held*, that the bank were not liable. *Shields* v. *Governor and Company of Bank of Ireland* - - - - - M.R. 222

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See COMPANY.

CHARGING ORDER — *Practice* — *Equitable execution—Appointing plaintiff receiver by way of —Stop order—Priority.*] On the 16th September, 1897, *A*, who had recovered judgment against *B*, obtained an order in the Queen's Bench Division, appointing himself receiver by way of equitable execution, on entering into security before the Master, over the beneficial interest of *B* in a sum of £250 Consols, standing to the credit of this suit pending in the Court of the Vice-Chancellor, and, on the 17th December, 1897, *A* obtained a stop-order from the Vice-Chancellor, but he omitted to perfect his security until 1900. On the 2nd November, 1897, *C*, another judgment creditor of *B*, obtained, in the Queen's Bench Division, an order charging the interest of *B* in the £250 Consols to the credit of the present action, and, on the 8th December, 1897, entered notice of this order in the books of the Accountant-General:—*Held* (affirming the decision of the Vice-Chancellor), that *C* was entitled to be paid his debt, out of the share of *B* in the Consols, in priority to *A*. *Fahey* v. *Tobin* - - APP. 511

CHARITY—*Bequest on condition—Undertaking to keep grave in order—Moral obligation—Rule against perpetuities.*] Bequest of £500 to the treasurer of the Society of St. Vincent de Paul, at *L.*, for the benefit of the poor of *L.*, "on condition that the committee of said society shall undertake in writing to my executors to have the railing and ironwork of the two vaults in St. *L.*'s cemetery . . . painted once in every three years." *Held*, a valid bequest. *Roche* v. *Mac Dermott* [M. R. 394

2. —— *Interest in land—Revocation of registered deed by unregistered deed—The Charitable Donations and Bequests* (*Ireland*) *Act*, 1844 (7 *&* 8 *Vict. c.* 97, *s.* 16)—*Transfer of bank shares and after-acquired property—Imperfect gift.*] A testator, prior to making his will, by registered deed conveyed to trustees real and personal estate, to hold upon trust for himself for life, and after his death for charitable purposes, as therein mentioned, reserving to himself a power of revocation. By a further deed, made in pursuance of this power, the testator purported to revoke and alter certain of the trusts in the former deed. He also conveyed to the same trustees further real estate and chattels real, and also certain bank shares, and all future property to be acquired by him for the same and further charitable purposes. The deed was not registered. The testator afterwards made his will, and bequeathed other property to the trustees of the deeds, upon the same trusts, but appointed no executors or residuary legatees. On his death administration, with the will annexed, was granted to one of his next-of-kin. The trustees brought an action to carry out the trusts of the deed and will, and to have the real and personal estate of the testator administered. The testator left a considerable amount of property, acquired after the execution of the second deed. No transfers of the bank shares were ever executed. 7 & 8 Vict. c. 97, s. 16, invalidates a donation for charitable purposes in Ireland of any estate in lands for such uses, unless the deed containing the same is registered in the Registry of Deeds within three calendar months after execution:—*Held*, (1) that so far as the second deed purported to revoke the trusts of the first deed, it was operative although not registered; (2) that, so far as it affected to create new charitable interests in the lands, it was invalid by not being registered; (3) that neither the bank shares nor the after-acquired property passed by the second deed. The *ratio decidendi* of *Atty.-Gen.* v. *Rye* (2 Vern. 453) and *Atty.-Gen.* v. *Burdett* (*Ib.* 755), aiding the defective execution of gifts for charitable purposes, does not apply to Ireland, the English and Irish statutes as to charitable uses being dissimilar. *In re Carey, deceased*; *Mitchell* v. *Ewing* - - - - - M. R. 81

—— Will—Gift for repair of an enclosure round grave—Void bequest - - 383
See PERPETUITY.

CHOSE IN ACTION—Existing equities—Assignment - - - - 38, 55
See WINDING-UP.

COMPANY — *Practice* — *Procedure* — *Contract* — *Memorandum in lieu of contract—Filing of—Application for relief by Company—Form of order and memorandum—Companies Act*, 1898 (61 *&* 62 *Vict. c.* 26), *sect.* 1.] A tramway Company was registered under the Companies Acts in 1896 to take over the undertaking of an existing tramway which had been incorporated by Act of Parliament. By the articles of association of the new Company the shareholders of the old Company were entitled to exchange their fully paid shares for fully paid 6 per cent. preference shares in the new Company of like amount. A circular letter enclosing a form of agreement was sent to each shareholder of the old Company for signature by the directors of the new Company in order to carry out the above arrangement, and the forms of agreement so sent out

COMPANY—*continued.*
were signed by all the shareholders except three, and fully paid preference shares in the new Company were allotted to them. By inadvertence the forms of agreement were not registered pursuant to section 25 of the Companies Act, 1867. Owing to the deaths of several of the shareholders, and to the number of signatures which would have to be obtained, it was impracticable to file a contract pursuant to the said Act. The Court, on motion made on behalf of the Company, made an order under sect. 1, sub-sect. 4 of the Companies Act, 1898, directing the filing of a memorandum in writing, in a form approved by it, specifying the consideration for which the shares were issued, to operate as if it were a sufficient contract in writing within the meaning of sect. 25 of the Companies Act, 1867. Form of order and memorandum under the Act. *In re Whitefriars' Financial Company, Limited* ([1899)] 1 Ch. 184) followed. *In re Dublin United Tramways Co.* (1896) *Limited, and in the Matter of the Companies Acts*, 1862-1898 [M. R. 340

—— Debentures—Equitable mortgage—Set-off by Company of claims against registered holder - - - - - - 73
See DEBENTURE.

—— Mortgage of uncalled capital—Submortgage—Winding-up order—Notice - 38, 55
See WINDING-UP.

COMPENSATION—Disturbance—Landlord and Tenant—Scale - - - 129
See DISTURBANCE.

—— Sale by Land Commission—Dilapidations pending completion - - - 165
See DILAPIDATIONS.

COMPROMISE—By executors—Costs—Priority
See COSTS. 2. [484, 529
PRIORITY.

—— By executors—Priority—Abortive proceedings—Assets not sufficient to pay legatees
See EXECUTOR. [404

CONDITION IN WILL—*Construction—Gift of farm—Devisee directed to legacy—Personal liability—Order for payment—Order LV., Rules* 4, 11—*Practice.*] A testator bequeathed a certain farm with the stock thereon to his son. There were certain conditions attached to the gift, and amongst them the following:—" It is my will that the said Thomas M'Mahon, my son, do pay off all my debts and burial expenses. It is my will that my son, the said Thomas M'Mahon, do give unto my daughter, Catherine M'Mahon, the sum of £350, to be paid to her in three instalments." The son went into possession of the farm under the will:—*Held* (on an originating summons, taken out by Catherine under Order LV., Rule 4), that he was personally liable for the payment of the legacy to her. Order made directing Thomas M'Mahon to pay legacy within three months. *In re M'Mahon, deceased*; *M'Mahon* v. *M'Mahon* - V.-C. 489

2. —— *" Wishing to return and settle in native country "—Condition becoming illusory—Dispensing with performance—Discretion of executors—Executors dead—Trust carried out by Court—Equality equity.*] A testator by will left two farms to his son *M.*, and by a codicil he provided that in the case of his son *R.*, who was then in New Zealand, wishing to return and to settle in his native country, one of the farms should be given to him by the testator's executors at such time and coupled with such conditions as they might deem expedient. The farms were sold in a suit, under an order which reserved the question of the rights of the parties in respect of the proceeds, and realized £1100 and £400, respectively. The executors were dead. *R.* had never returned, and was still in New Zealand:—*Held*, that the proceeds of the two farms should be divided into two equal parts, and that *R.* was entitled to be paid one moiety without returning to this country. *Croskery* v. *Ritchie* [V.-C. 437

CONDITIONAL LEGACY—Keeping grave in order—Perpetuity—Moral obligation 394
See CHARITY. 1.

CONSENT—Litigation in Queen's Bench Division, Probate — Costs — Administration action - - - - - 484
See COSTS. 2.

CONSIDERATION—Partly illegal—Mortgage
See MORTGAGE. 3. [239

CONTINGENT POWER — Covenant not to exercise—Subsequent exercise of joint power by covenantor and joint donee
See POWER. [12, 261

CONTRACT—Company—Memorandum in lieu of—Filing—Practice - - 340
See COMPANY.

—— For benefit of third party—Right of action
See GUARANTEE. [301, 308

CONVEYANCE — For charitable purposes — Donation—Registration - - 81
See CHARITY. 2.

—— Release from rentcharges—Costs—Solicitors' Remuneration Act - - - 105
See TAXATION OF COSTS. 2.

COSTS—*Immunity of Crown Department.*] Upon an objection by the Board of Trade claiming foreshore, which was overruled:—*Held*, that as the Board represented the Crown, and the case not falling within 18 & 19 Vict. c. 90, costs could not be given against them. *In re Dublin Wicklow and Wexford Railway Company*; *Ex parte Jordan* (31 L. R. Ir. 1) not followed. *In re Vernon's Estate* - - - - - Ross, J., 1

COSTS—*continued.*

2. —— *Of litigation in Probate Court—Administration—Will propounded by devisee of real estate, and disputed by testator's widow—Action settled by consent—Pecuniary legatees—Order of Probate Court, directing costs to be paid out of assets—Priority.*] The will of a testator was propounded by a devisee of real estate, and disputed by testator's widow, who were respectively plaintiff and defendant in the probate action, which was settled by consent, the terms being that the plaintiff should relinquish to the defendant a portion of the interest in the realty, devised to him under the will, and that the will should be admitted to probate, and that plaintiff and defendant should have their costs out of the assets. The pecuniary legatees were not parties to this consent, which was made a rule of Court, but were aware of it, and did not object. The pecuniary legatees having applied for the administration of the personal estate of the testator, by consent the sole question left for the determination of the Court was, in what priority the costs of the probate action were to be paid:—*Held*, that those costs should be paid rateably, according to the respective values of the real and personal estate. *M'Kenna* v. *M'Kenna* - V.-C. 484

—— Compromise in Probate Court—Mortgage—Priority - - - - - - 529
See PRIORITY.

—— Sale of mortgaged premises—Administration suit—Insufficiency of proceeds of sale
See MORTGAGE. 1, 2. [466, 470

—— Taxation—Conveyance—Release from rent-charges—Solicitors' Remuneration Act
See TAXATION OF COSTS. 2. [105

—— Taxation—Fees to counsel - - 480
See TAXATION OF COSTS. 1.

COUNTY COUNCIL—Repair of roads—Steam roller—Injury to gas pipes 492, 507
See ROAD.

COVENANT—To build—Lease—Fair rent 441
See BUILDING COVENANT.

—— To exercise contingent power - - 12, 261
See POWER.

CROWN—Prerogative—Right to select Court
See TRANSFER OF ACTION. [346

—— Proceedings on behalf of—Costs - 1
See COSTS. 1.

—— Reversion of—Sale under Land Purchase Acts - - - - - - 377
See LAND LAW (IRELAND) ACTS. 3.

DAIRY FARM—*Landlord and tenant—Land Law (Ireland) Acts—"A holding let to be used wholly or mainly for a dairy farm"—Land Law (Ireland) Act,* 1896 (59 *&* 60 *Vict. c.* 47, *s.* 5 (1) (*c*)).] The statutory *genus* of holdings which are let to be used wholly or mainly for the purpose of pasture contains within it a statutory *species* of holdings let to be used wholly or mainly for dairy farms. With the exception of this single named *species*, the statutory *genus* is (subject to certain conditions of value, residence, and user) excluded from the provisions of the Land Law Acts. The principles by which it is to be ascertained whether any individual holding falls within the *species* are the same as those by which, in the first instance, it is determined to come within the *genus*. Where the contract of letting does not fix, either by express terms or by implication, the uses which the tenant is to make of the holding, the purpose, which must be a purpose common to both landlord and tenant at the date of the letting, is to be proved as a matter of fact by considering the natural capabilities and equipment of the subject-matter of the contract, its user under the contract, and the circumstances attending the making of the contract. The principles above stated, illustrated in the case of a holding which was, in the year 1895, ruled out of the provisions of the Land Law (Ireland) Acts, 1881 and 1887, on the ground that it was let to be used for purposes of pasture, but which was now, on the evidence, held to come within the exception from this exclusion created by section 5 (1) (*c*) of the Land Law (Ireland) Act, 1896. *Lord Cloncurry, Landlord*; *Heuston, Tenant* [APP. 152

DEBENTURE—*Company—Deposit of by registered holder with bank—Right of set-off by Company against registered holder — Equities disregarded.*] The registered holder of debentures issued by a limited Company deposited them with a bank to secure advances, but no transfer was executed, nor any notice of the deposit given to the Company. At the date of the deposit and of the winding-up the registered holder was indebted to the Company in a larger sum than the amount of the debentures, and was also indebted to the bank in a less sum for advances. The conditions of the debentures provided that the registered holder would be regarded as exclusively entitled to the benefit of the debentures, and that all persons might act accordingly, that the Company should not be bound to enter in the register notice of any trust, or to recognise the right of any other person, save as therein provided; that the money secured by the debentures would be paid without regard to any equities between the Company and the original or any intermediate holder thereof, and the receipt of a registered holder for such money should be a good discharge to the Company:—*Held*, that the Company was entitled to set off the amount due to it from the registered holder as against the amount of the debentures payable to him, and that the Company was not bound to have regard to the claim of the bank as against the registered holder. *In re Richard Smith and Company, Limited* M.R. 73

DEBENTURE—*continued.*

—— Mortgage of uncalled capital—Sub-mortgage —Notice of winding-up order - 38, 55
See WINDING-UP.

DEMESNE LANDS—*Landlord and tenant—Land Law (Ireland) Acts,* 1881–1896—*Character of holding—" Lands which when first demised were demesne "—" Intended to be preserved or resumed as demesne "—Land Law (Ireland) Act,* 1896, *s.* 5, (1), (*b*), (*ii.*).] In the year 1873 *P. S.*, who was tenant for life of an estate including a mansion-house and demesne where he resided, made lettings to farmers of portions of the demesne in consideration of fines in addition to the yearly rents reserved. Shortly afterwards he auctioned his effects and ceased to reside on the property. On his death he was succeeded by *C. S.*, who was owner in fee-simple of the property. *C. S.* adopted the tenancies so created by *P. S.*, and took the rent from the tenants. *C. S.* never resided on the property; and he put a caretaker into the mansion-house, and by his will devised the estate to trustees to sell. The holdings let by *P. S.* were situated inside the ambit of the demesne; two of them adjoining the mansion-house had no buildings on them; the third comprised two acres of woodland out of an entire area of 48 acres. Two of the holdings were suitably used for agricultural and pastoral purposes: one of them was unsuitably used as a meadow, and was overmeadowed. The mansion-house was at the hearing before the Land Commission in a deteriorated condition, and the demesne neglected and uncared for:—*Held,* that the period when these holdings were " first demised " within the meaning of sect. 5 (*b*) ii. of the Land Law Act, 1896, was when *C. S.* came into possession of the estate as owner in fee-simple and adopted as his tenants the tenants to whom *P. S.* had made the lettings. *Held* also, that the circumstances of the case did not show that the holdings were " intended to be preserved as demesne or resumed as demesne by the landlord," and that the tenants were entitled to fix fair rents in respect of their holdings. *Trustees of Simpson, Landlords; Farley and others, Tenants* [APP. 418

DEVISEE — Condition — Personal liability to pay legacy - - - - - 489
See CONDITION IN WILL. 1.

DILAPIDATIONS — *Landlord and tenant — Land Purchase Acts — Sale of holding by Land Commission — Liability for dilapidations before purchaser is put into possession.*] The Land Commission sold a holding purchased under the Purchase of Land Acts, on default being made by the tenant in payment of the instalments. Before the purchaser was put into possession, the tenant-purchaser committed dilapidations on the holding to a considerable extent:—*Held,* that the purchaser had a lien on the purchase money for the difference between the value of the holding when he purchased it and its value after the dilapidations. *In re Dwyer* - - - - LAND. COM. 165

DISCONTINUANCE OF POSSESSION — Statute of Limitations - - 1
See LIMITATIONS, STATUTE OF. 1.

DISCRETION—Of executors — Death without exercising—Trust carried out by Court—Equality equity - - - 437
See CONDITION IN WILL. 2.

DISTURBANCE—*Landlord and tenant—Ulster custom—Compensation for disturbance—Compensation for improvements — Holding not within the Land Law Act,* 1881—*Scale of compensation*—44 & 45 *Vict. c.* 49, *s.* 6—33 & 34 *Vict. c.* 46, s. 3.] By lease, dated the 11th September, 1865, *C.* and his wife demised to *F.* a holding in the county of Fermanagh for fourteen years, provided Mrs. *C.* should so long live. After the expiration of the term the tenant remained on as yearly tenant. In 1889 the tenant served notice to fix a fair rent in respect of the holding, but the application was dismissed on the ground that the holding was let for temporary convenience. The landlord served notice to quit, and the tenant filed a claim for compensation for disturbance and for improvements. The County Court Judge awarded to the tenant compensation for disturbance and improvements on the scale set forth in sect. 6 of the Land Law (Ireland) Act, 1881. On appeal to the Land Commission this decision was affirmed:—*Held* (by Lord Ashbourne, C., and FitzGibbon and Holmes, L.JJ.; Walker, L.J., *dissentiente*), that the tenant was entitled to compensation for disturbance only, upon the scale set forth in sect. 3 of the Land Act, 1870, and that the holding, being one let for temporary convenience, no part of the Act of 1881 applied to it. *Fawcett, Tenant; Collum, Landlord* - - - - - - APP. 129

DUTY ON SALE—Superior interests redeemed
See REVENUE. [477

EQUITABLE EXECUTION — Receiver — Delay in perfecting security—Charging order - . - - - - 511
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EQUITABLE MORTGAGE — Banker — Registration—33 Geo. 2, c. 14 (Ir.) 172
See BANKER. 1.

—— Debentures — Set off by Company of claim against registered holder - - 73
See DEBENTURE.

—— Proof in administration action—Sale—Insufficiency of proceeds—Costs - - 470
See MORTGAGE. 2.

ESTATE IN LAND—Conveyance for charitable purposes — Donation—Registration —Revocation - - - - - 81
See Charity. 2.

ESTOPPEL—By conduct - - - - 360
See Trust.

EVIDENCE—*Landlord and tenant—Land Law (Ireland) Act*, 1881, *sect.* 48, *sub-sect.* 4—*Land Commission—Jurisdiction — Fair rent — Power to refer to Court valuers — Court valuers' report — Right to examine Court valuers as to principle on which their valuation was made—Bias and prejudice.*] On the hearing of an appeal from an order of the County Court fixing a fair rent, counsel for the landlord objected to the report made by the two Court valuers being received by the Land Commission, on the grounds—(1) That the reference was made to two valuers, while sect. 48 of the Land Law Act, 1881, only contemplated a reference to one; (2) that every independent valuer is bound to rely on his own skill and knowledge, and in this case they were furnished with a copy of a report of the Court valuer in the County Court to assist them in making their report; (3) that the valuers were not independent valuers because they had previously been employed as Assistant Commissioners; (4) that there was no power to refer to the valuers except on a question arising in the course of the hearing:—*Held*, that the reference to two Court valuers was legal, and that these objections were untenable. Counsel for the landlord also offered evidence for the purpose of showing that the Court valuers' report should not be received on the grounds—(1) That they had been in the habit of valuing land on erroneous principles; (2) that they had shown bias and prejudice against landlords generally:—*Held*, reversing the decision of the Land Commission (Walker, L.J., *dissentiente*), that such evidence was admissible. *O'Regan, Tenant; Trench, Landlord* - - - - - App. 274
—— Presumption of advancement — Rebutting
See Trust. [360

EXECUTION—Equitable.
See Equitable Execution.

EXECUTION OF POWER.
See Power.

EXECUTOR — *Liabilities — Action in Probate Court to establish will—Compromise—Agreement to pay sum out of the assets to buy off opposition—Abortive proceedings — Assets subsequently not sufficient to pay legatees in full*]. A testator died in 1894, leaving assets, which were supposed to be worth over £15,000. He made his will the night before he died, appointing the defendants executors and trustees, and left legacies of £4000 to each of two nieces, both of whom were minors, and a large number of other legacies, amounting in pecuniary value to £13,800. A brother of the testator, who was supposed to be the heir-at-law, but to whom nothing had been left, entered a *caveat* against probate being granted. The executors brought an action in the Probate Court to establish the will, which was tried in January, 1895, when the executors compromised the suit by paying the caveator £2000, and £300 for his costs. In 1896 an elder brother of the testator, who had emigrated to Australia over twenty years before, and had not been heard of for many years, returned to Ireland, and brought an action to have probate recalled, and the will set aside. The action was tried in April, 1897, when the jury disagreed. The action was tried a second time in 1898, when a verdict was found in favour of the will, omitting certain clauses. In an action to administer the estate of the testator the assets were found insufficient to pay the legacies:—*Held* (affirming the decision of the Vice-Chancellor), that the executors were not entitled to credit for the sums of money spent in compromising the first probate suit; but *held* (varying the order of the Vice-Chancellor), that the executors were entitled to their costs in the first probate suit. *Graham* v. *M'Cashin* - - - - - App. 404
—— Costs incurred in establishing will—Priority - - - - 484, 529
See Costs. 2.
Priority.
—— Discretion — Death before exercising—Trust carried out by Court — Equality equity
See Condition in Will. 2. [437
—— Payment of trust-money into credit of his own banking account — Notice — Liability of bank - - - - 222
See Banker. 2.

EXECUTORY DEVISE — Revocation of preceding gift — Substitutional disposition
See Revocation. [109, 116

FAIR RENT—Buildings erected by lessee pursuant to covenant—Arrears paid by incoming tenant - - - 441
See Building Covenant.
—— Valuers — Evidence of bias and prejudice —Admissibility - - - 274
See Evidence.

FEE-FARM GRANT — *Renewable Leasehold Conversion Act—Validity of grants made separately to owners of divided parts of estate of lessee—Grant at Common Law.*] By a deed of 1698 *A's* predecessor in title demised certain lands to *B* for three lives, with a covenant for perpetual renewal. *B's* interest became vested in the predecessors in title of *C*, *D*, and *E*, and the lands were divided between them. In 1819 the lease was further renewed, and

FEE-FARM GRANT—*continued.*
the day following this renewal the lands were partitioned between them by deed. In 1832 the lease was further renewed to *C*, *D*, and *E*, jointly. *C* purchased *A's* interest, and made separate fee-farm grants to *D* and *E* (without any reference in the *testatum* to the Renewable Leasehold Conversion Act), of the portion each had under the deed of partition. *D's* portion was for sale in the Land Judge's Court:—*Held*, upon a query on the title of *D*, that, without deciding that the grants were valid under the statute, and subject to the argument of any objection by *E*, *D* was entitled to have his estate under his fee-farm grant offered for sale. *In re Lane's Estate*; *Creed*, *Petitioner* [Ross, J., 32

2. —— *Renewable Leasehold Conversion Act—Validity of grant—Purchase by lessee of part of lands in renewable lease—Fee-farm grant of the remaining part—Title.*] By a lease of 1721 the lands of *B* were demised to *L.'s* predecessor in title for lives, with a covenant for perpetual renewal, subject to a rent of £3 (Irish). The lessor's interest became vested in three persons, viz. *A.*, *W.*, and *H.* By a deed of 1766 the share of *A.* (viz. one-half) and *W.* (viz. one-eighth) of "the lands and rent of £3" were conveyed to the lessee, his heirs and assigns. A fee-farm grant of the remaining three-eighths of the lands was afterwards made to the successor in title of the lessee. It was objected that this grant was invalid as not being one of the whole of the lands in the lease:—*Held*, that, without deciding whether the grant was good or not, the petitioner was entitled to have the lands offered for sale. *In re Low's Estate*; *Franklin*, *Petitioner* [Ross, J., 36

—— Made before 1860—Whether purporting to create relation of landlord and tenant 453
See Residential Holding.

GAS PIPES—Injury to—Steam roller 492, 507
See Road.

GIFT—To charity—Registration of deed—Estate in lands—Bank shares and after-acquired property—Imperfect gift - - 81
See Charity. 2.

GRAVE—Repair of an enclosure round—Perpetuity—Void bequest - - - 383
See Perpetuity.

—— Undertaking to keep in order—Conditional legacy—Moral obligation—Perpetuity
See Charity. 1. [394

GUARANTEE — *Insurance — Fidelity bond — Right to sue by person not a party to the contract—Receiver appointed by mortgagees under sections* 19 *and* 24 *of the Conveyancing Act*, 1881.] The National Bank, who were mortgagees of *A's* estate, appointed *B* receiver under their statutory power conferred by the Conveyancing Act, 1881, and *B* and the defendant Corporation entered into a bond with the bank conditioned for *B's* due discharge of his duty as statutory receiver. *A* was not a party to this bond. *B* having made default, the bank were paid off the full amount of their demand out of the mortgaged estate:—*Held*, by the Court of Appeal (*diss.* Walker, L.J.), reversing the decision of the Master of the Rolls, that *A* and the bank were entitled to sue on the bond for the amount of the default. *Kenney* v. *Employers' Liability Assurance Corporation* - M. R. 301; App. 308

HOLDING—Dairy farm - - - - 152
See Dairy Farm.

—— Residential - - - - - - 453
See Residential Holding.

HUSBAND AND WIFE—*Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29)—*Widow, right of Marriage settlement executed before Act—Provision in bar of share of husband's estate.*] A provision for a wife in a marriage settlement executed before the passing of the Intestates' Estates Act, 1890, in discharge of all claims by her on the estate and effects of her husband, bars her right to the sum of £500 given by the Act to a widow out of her husband's assets in the event of his dying intestate and without issue, as well as to the share of his assets to which she is entitled under the Statute of Distributions. *In re Hogan, deceased*; *Hogan* v. *Hogan* [M. R. 168

—— Advancement — Presumption — Evidence to rebut - - - - - - 360
See Trust.

—— Injunction — Trade carried on by wife — Interference by husband - - 217
See Trading by Wife.

IMPERFECT GIFT — Charity — Bank shares and after acquired property - 81
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IMPLIED GIFT—Will—Construction 109, 116
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ILLEGALITY—Part of consideration - 239
See Mortgage. 3.

ILLUSORY CONDITION—Will—Dispensing with performance - - - 437
See Condition in Will. 2.

INDEMNITY—Sale of lands subject to, under Land Purchase Acts - - - 392
See Land Law (Ireland) Acts. 2.

INFANT—*Originating summons—Jurisdiction—Advancement—Assets in the hands of administrator—Course of administration—Question affecting next-of-kin—Rules of* 1891, *Order LV.*, *Rule* 4, *subsects.* (*a*) (*g*).] The plaintiff as *administrator de bonis non* of the estate of the father of an infant had in his hands as assets a sum of £2013, to one-third share of which the infant was entitled. The

INFANT—*continued.*
plaintiff issued an originating summons under Order LV., Rule 4, asking for a declaration that he was at liberty to advance £315 out of the infant's share in order to pay an apprenticeship fee for him to a chartered accountant in order to enable him to learn that business:—*Held*, that the Court had power to sanction the proposed advancement, and would do so under the circumstances of the case. *Curtis* v. *Curtis* - - - M.R. 374

INJUNCTION—Against injury to gas-pipes—Steam roller - - - 492, 507
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—— To permit purchaser of growing timber to cut and remove same - - - 122
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INTEREST ON MONEY — Mortgage — Proviso for reduction of—Overpayment 78
See Mortgage. 4.

—— Rate of—Mortgage—Merger - - 530
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INTESTACY — Registration of judgment as mortgage against share of next-of-kin 429
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INTESTATES' ESTATES ACT, 1890—Settlement barring widow's share - 168
See Husband and Wife.

JESUITS—*Will—Legacy—Bequest to Rector of Jesuit Order in aid of school—Validity of—Illegality—Roman Catholic Relief Act—Scope of legislation*—10 *Geo.* 4, *c.* 7.] A testatrix by her will made the following bequest:—"I leave to the rector of the Jesuits at *M.* in aid of the school there, for the training of pupils intended for the church, the sum of £500." The school at *M.* was the property of, and managed by, the Jesuit Order: It was divided into two parts, one of which was a lay boarding school, and the other was an apostolic school, where students were educated for the church, some for the secular priesthood, and, some (if they so elected) for the Jesuit or other Order, all these apostolic students being intended to act as missionaries in foreign parts. There was no pecuniary profit to the Jesuit Order from the apostolic portion of the school:—*Held*, that the gift was not invalid as being contrary to the policy of the Roman Catholic Relief Act (10 Geo 4, c. 7), or as directly tending to train up students to be Jesuits. *Roche* v. *M'Dermott* - M. R. 394

JOINT POWER—Contingent sole power in one of joint donees—Covenant - - 12, 261
See Power.

JOINT TENANCY—Next-of-kin—Statute of Limitations - - - - 298
See Limitations, Statute of. 2.

JUDGMENT—Mortgage debt—Rate of interest —Merger - - - - 530
See Merger.

—— Receiver—Delay in perfecting security—Stop order—Charging order - - 511
See Charging Order.

JUDGMENT MORTGAGE—*Affidavit — More than one plaintiff—Affidavit sworn by one plaintiff only*—13 *&* 14 *Vict. c.* 29.] Judgment was recovered in an action at law by *J. I.* and *R. J. I.* against *G. K.* The affidavit filed to register the judgment as a mortgage was sworn by *R. J. I.* only, in which he stated that he recovered the judgment, that the name and title of the action was *J. I.* and *R. J. I.*, plaintiffs; and *G. K.*, defendant, and that he was one of the plaintiffs, and it gave the place of abode and trade of *R. J. I.* The plaintiffs were brothers, who carried on the business of farmers, and, as was stated, at the same place at the date of the judgment:—*Held*, that the affidavit was a sufficient compliance with the statute. *In re Kane and The Local Registration of Title Act* - App. 520

2. —— *Judgment against one of next-of-kin of intestate—Registration as mortgage against interest in intestate's chattel real—Invalidity of*—13 *&* 14 *Vict. c.* 29.] The right of a next-of-kin to a share of the personal estate of an intestate, consisting in whole or in part of chattel interest in land, is not such an estate or interest in the lands as is capable of being attached by a judgment mortgage under 13 & 14 Vict. c. 29, sects, 6, 7. *In re Carolan and Scott's Contract* ([1899] 1 I. R. 1) followed, notwithstanding *Tench* v. *Glennon* (34 I. L. T. R. 157). *Tevlin* v. *Gilsenan*
[V.-C. 429 [Rev.]

JURISDICTION—Land Commission — Valuers
See Evidence. [274

—— Land Judge—Partition—Unincumbered share —Delivery of order - - 213
See Partition.

—— Land Judge—Withdrawal of estate—Discretion — Land Law (Ir.) Act, 1896 — Adequate offers—Lapse of time
[248, 250
See Land Law (Ireland) Acts. 4.

KING—Suing by Secretary of State—Prerogative—Right to select court - 346
See Transfer of Action.

LAND JUDGE'S CONVEYANCE—*Sale of growing timber—Subsequent sale of lands—Purchaser with notice—Refusal by purchaser to allow timber to be cut and removed—Conveyance without reservation — Personal equity — Right to cut and remove timber—Injunction.*] Certain timber, growing on lands which were under the control of the Landed Estates Court, was ordered by the Judge to be sold by the receiver, and accordingly the timber was sold by public auction. The lands were

LAND JUDGE'S CONVEYANCE—*continued.* subsequently sold to a purchaser, who had full notice of the sale of the timber. The purchaser of the timber shortly afterwards entered on the lands for the purpose of cutting and removing the timber. The purchaser of the lands refused to allow this. Subsequently a Land Judge's conveyance was executed to the purchaser of the lands, without, however, any reservation of the timber:—*Held*, that the purchaser of the timber was entitled to an injunction to compel the defendant, who was the successor in title of the purchaser of the lands, to allow him to cut and remove the timber, although not reserved by the conveyance, inasmuch as the purchaser of the lands had purchased with full notice of the sale of the timber, and there was therefore such an equity affecting his conscience, as to preclude his successor in title from relying on the effect of the Land Judge's conveyance. *O'Hanlon* v. *Murdock* - - - V.-C. 122

LAND LAW (IRELAND) ACTS — *Land ordered to be sold under the Partition Acts—Receiver appointed by Judge of Chancery Division.*] 1. A receiver appointed by a Judge of the Chancery Division is a receiver within section 40 of the Land Law (Ireland) Act, 1896. 2. In a proceeding under the Partition Act, 1868, the Master of the Rolls directed lands to be sold through the Land Judge's Court:—*Held*, that section 40 applied. *In re Graham's Estate* - - Ross, J., 474

2. —— *Superior interest — Indemnity—Indemnifying lands sold under Land Purchase Acts.*] Portion of lands held under a fee-farm grant were sold in the Landed Estates Court, subject to the entire rent, but bound to indemnify the remainder of the lands therefrom. These indemnifying lands were subsequently being sold to the tenants:—*Held*, that the entire of the rent should be redeemed, and not, as the owner of the rent contended, an apportioned part thereof only, as an apportionment would necessitate the retention for ever of an adequate part of the purchase money as an indemnity. *In re Thompson's Estate*; *Vandeleur and others, Petitioners* - - Ross, J., 392

3. —— *Superior interest — Reversion of the Crown.*] The reversion of the Crown in a vendor's estate, held under patent for the lives of the grantee from the Crown and his heirs male, is not within section 31 of the Land Law (Ireland) Act, 1896; and the redemption of it can only be carried out under section 68 of the Landed Estates Court Act, with the consent of the Crown. *In re Fischer's Estate* - - Meredith, J., 377

4. —— *Withdrawal of estate from sale to which the Land Law (Ireland) Act, 1896, applies, where an order under section 40 has not been made—Offers by tenants to purchase sanctioned at adequate prices—Lapse of time—Discretion of Land Judge—Appeal.*] An order for sale of an estate to which the Land Acts applied had been made in 1880 and a receiver had been appointed by the Court. In 1891 portion of the lands were sold, and the petitioners were paid off, the unpaid incumbrances consisting of a mortgage for a small amount and family charges. After the passing of the Land Act of 1896 an attempt was made to sell the remaining portion of the estate to the tenants; and on the 17th December, 1898, the estate was placed in the Land Judge's list under Rule 5, when the matter was adjourned to enable the owner to have an opportunity to raise money to withdraw the estate from Court. On the 1st March, 1899, an order was made by the Land Judge that the sale should proceed. Preliminary offers by the tenants to purchase their holdings were signed in October, 1899, the inspection by the Land Commission took place, and the Land Commission agreed to make the advance. In January, 1900, an application to sell under the 40th section of the Land Law (Ireland) Act, 1896, was made to the Land Judge, and this application had been repeatedly adjourned, as the owner was trying to take the case out of Court, and had been endeavouring to get the consent of the incumbrancers to that course being adopted, and no order was made under the section. Formal proposals were afterwards made by the tenants to purchase on the terms sanctioned by the Land Commission, which came before the Land Judge on the 27th March, 1900, when he accepted them. The owner appealed, seeking by his notice of appeal that the receiver should be discharged, and that upon the undertaking of the owner and the first mortgagee to pay any balance due to the receiver, and any costs chargeable on the estate, and upon the consent of all unpaid incumbrancers, the petition should be dismissed, and the order for sale discharged:—*Held*, by the Court of Appeal, that although in the absence of an order under the 40th section, the tenants had no *status* to compel acceptance of their offers, yet, under the circumstances of the repeated opportunities afforded to the owner, the lapse of time since the order for sale was made, the failure to obtain money to discharge outstanding incumbrances, and the adequacy of the price offered by the tenants, the discretion of the Land Judge should not be overruled. *In re Bunbury's Estate*; *Robinson and Fry, Petitioners.*
[Ross, J., 248; App. 250

—— Dairy farm—Holding to be used wholly or mainly for - - - - 152
See Dairy Farm.

—— Demesne lands—Land Law (Ireland) Act, 1896, s. 5, (1) (*b*) (ii) - - - 418
See Demesne Lands.

LAND LAW (IRELAND) ACTS—*continued.*

—— Disturbance—Letting for temporary convenience—Scale of compensation 129
See Disturbance.

—— Duty on sale — Redemption of superior interests - - - - - 477
See Revenue.

—— Fair rent—Building covenant—Arrears of rent paid by tenant on obtaining possession of holding - - - - 441
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—— Fee-farm grant made before 1860 - 453
See Residential Holding.

—— Sale of holding by Land Commission—Dilapidations pending completion—Compensation to purchaser - - - 165
See Dilapidations.

—— Subdivision of holding—Sale by Land Commission—Time - - - - 163
See Subdivision.

—— Valuers—Jurisdiction—Evidence of bias and prejudice—Admissibility of - 274
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LANDLORD AND TENANT — Fee-farm grant made before 1860 - - 453
See Residential Holding.

—— Land Law (Ireland) Acts.
See Land Law (Ireland), Acts.

—— Lease.
See Lease.

LEASE—Building covenant—Fair rent - 441
See Building Covenant.

—— For lives renewable for ever—Fee farm grant
See Fee-farm Grant. 1, 2. [32, 36

LEGACY—Ademption in part - - 383
See Ademption.

—— Condition annexed to devise — Personal liability of devisee - - - 489
See Condition in Will. 1.

—— Conditional—Keeping grave in repair—Moral obligation—Perpetuity - 394
See Charity. 1.

—— In aid of school managed by Jesuits - 394
See Jesuits.

—— Insufficiency of assets—Compromise—Executor—Liability of - - - 404
See Executor.

—— Repair of enclosure round grave—Perpetuity
See Perpetuity. [383

—— Trust carried out by Court—Equality equity —Illusory condition—Dispensing with performance - - - - 437
See Condition in Will. 2.

LIMITATIONS, STATUTE OF—*Discontinuance of possession—User of land.*] In 1819 portion of the Bull of Clontarf, a sandy tract in Dublin Bay, was taken from *V.'s* predecessor, by the Dublin Ballast Board, after an inquisition, and an award was made, containing a map on which the boundary between the land taken and *V.'s* land was stated. Some years afterwards three wooden posts were put by an officer of the Board in a line considerably outside the boundary, as shown on the map. As these posts decayed two walls, 21 feet long by 8 feet high, were built on their site. These were the only physical marks of a boundary. *V.'s* cattle grazed beyond them without interruption. In 1865 a portion of the land between the boundary on the map and the walls, and which had been previously fenced off, was leased by the Board to the Admiralty. In 1876 and 1884 the question as to the correct boundary was raised between the Board and *V.* In 1884 *V.* commenced an action against the Board, claiming damages for trespass, and an injunction. This action was never brought to a hearing:—*Held*, that there had been no discontinuance of possession by *V.*, and that he was entitled to the land between the boundary on the map and the posts, except that portion leased to the Admiralty. *In re Vernon's Estate*
[Ross, J., 1

2. —— *Next-of-kin remaining in possession of chattel real—Acquisition of beneficial interest—Joint tenancy.*] Where some of the next-of-kin of a tenant who died intestate continued in possession of his holding for a period sufficient to confer title under the Statute of Limitations:—*Held*, that they had thereby acquired a beneficial title under the Statute; and that the character of the title was a joint tenancy. *In re Brown, deceased*; *Coyle* v. *M'Fadden* - - - - - Ross, J., 298

MARRIAGE—Before Intestates' Act, 1890—Settlement—Bar of widow's share in husband's estate - - - 168
See Husband and Wife.

MEMORANDUM—In lieu of contract with Company—Filing - - - 340
See Company.

MERGER — *Mortgage — Priority—Judgment — Interest.*] Appeal from the decision of the Court of Appeal in Ireland reported [1900] 1 I. R. 103, *sub. nom. Usborne* v. *Limerick Markets Trustees.* The House of Lords (the Earl of Halsbury, L.C., and Lords Shand, Davey, and Brampton) affirmed the decision of the Court of Appeal in Ireland on the question of priority, without prejudice to the rights of the Limerick Corporation, who had not intervened in the proceedings in the Irish Courts; and reversed the decision below as to the rate of interest, holding that the merger effected by the judgment obtained in the Common Law Division only affected proceedings taken under that judgment, and did not prevent the mortgagees from independently having recourse to their security fo the payment of principal and interest at the rat

MERGER—*continued.*
specified in the mortgage. *Economic Life Assurance Society* v. *Usborne and others* - H. L. 530

MONEY LENDER — Whether banker — 33 Geo. 2, c. 14 (Ir). - - - 172
See BANKER. 1.

MORTGAGE—*Administration—Executor—Sale of mortgaged premises—Proceeds insufficient to meet mortgage debt—Costs of sale.*] Portion of an estate which was being administered consisted of five houses, four of which were furnished. The premises were subject to a mortgage, and the mortgagees applied for leave to sell in the Land Judge's Court. The Vice-Chancellor, however, directed the executor to sell, and retained the sale in his own Court. A considerable saving in costs was thereby effected, and the proceeds of the sale were further enhanced by the houses being sold with the furniture, as a going concern. The mortgagees having applied to have the costs of the sale paid out of the general estate:—*Held*, that the proceeds of the sale, so far as they were enhanced by the mode of sale adopted, enured for the benefit of the mortgagees as well as of the general creditors, and that, as the mortgagees had obtained the benefit of such increased value, and as they had applied, in the first instance, for a sale of the mortgaged premises in the Land Judge's Court, where the entire costs of sale would have been paid out of the proceeds, they were not entitled to have the costs of the sale paid out of the general estate, but that the costs of the sale should come out of the proceeds of the sale of the mortgaged premises. *Hilliard* v. *Moriarty* ([1894] 1 I. R. 316, 319) and *Ross* v. *Ross* (29 L. R. Ir. 318) discussed and distinguished. *Cope* v. *Breslin* - - - - V.-C. 466

2. —— *Administration suit—Insolvent estate—Equitable mortgagee proving as creditor—Sale of mortgaged property—Proceeds of sale insufficient to pay mortgage debt—Costs of sale.*] In a suit by next-of-kin and heiresses-at-law for administration, equitable mortgagees on real estate of the deceased, not having been called upon to value their security, proved as creditors for the full amount of their debt. The mortgaged property was sold, the personal representative having carriage and the mortgagees lodging the title deeds pursuant to an order. The proceeds of the sale were insufficient to pay the mortgage debt, and the general personal estate was insufficient to pay the balance and the other debts:—*Held*, that there were no special circumstances to take the case out of the rule laid down in *Hilliard* v. *Moriarty* ([1894] 1 I. R. 316), and that the mortgagees were entitled to the proceeds of the sale without deduction for the costs thereof. *M'Aloon* v. *M'Aloon* [V.-C. 470

3. —— *Consideration partly illegal—Tippling Acts—55 Geo. 3, c. 104, s. 15.*] The circumstance that portion of the consideration for a mortgage consists of spirituous liquors supplied upon credit contrary to the provisions of the Tippling Acts vitiates the security only to the extent of the illegal consideration. *Sheehy* v. *Sheehy* - APP. 239

4. —— *Interest—Provision for reduction of, on punctual payment on gale days in "every" year—Default in punctual payment—Over-payment of interest treated as payment of capital.*] A proviso for reduction of interest on a mortgage debt, on payment upon the gale days therein named "in every year," or within sixty days then ensuing, and that the mortgagor should not be entitled to the benefit thereof while any interest previously accrued due should remain unpaid, only deprives the mortgagor of the benefit of reduction in each gale where the interest is not paid punctually. Over-payments of interest are to be treated as payments of principal *pro tanto*. *In re Carroll's Estate*; *W. and T. Amherst, Petitioners* [Ross, J., 78

—— By Company—Uncalled capital—Sub-mortgage—Winding-up order—Notice
See WINDING-UP. [38, 55

—— Deposit of debentures—Set off by Company of claim against registered holder 73
See DEBENTURE.

—— Equitable—Banker—33 Geo. 2, c. 14 (Ir.)
See BANKER. 1. [172

—— Interest — Statutory borrowing powers — Merger—Priority - - - - 530
See MERGER.

—— Judgment—Share of next-of-kin - 429
See JUDGMENT MORTGAGE. 2.

—— Priority—Compromise—Costs - 529
See PRIORITY.

—— Receiver—Fidelity bond—Right of action—Conveyancing Act, 1881, sect. 24, sub-s. 2 - - - - 301, 308
See GUARANTEE.

—— Subject to charges "so far as they affect the land" - - - - 12, 261
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NEXT-OF-KIN—Possession of chattel real—Acquisition of beneficial interest—Joint tenancy - - - - - 298
See LIMITATIONS, STATUTE OF. 2.

—— Question affecting—Advancement to infant—Originating summons—Practice 374
See INFANT.

—— Registration of judgment mortgage against share of - - - - - 429
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NOTICE — Of intention to commit breach of truth—Banker and customer—Executor paying testator's moneys into credit of his own account - - - 222
See BANKER. 2.

NOTICE—*continued.*

—— Purchaser in Land Judge's Court—Conveyance—Prior sale of growing timber 122
See Land Judge's Conveyance.

—— Sub-mortgage of uncalled capital—Winding-up - - - - - - 38, 55
See Winding-up.

ORDERS, GENERAL — 1884 (15th April) — Solicitors' Remuneration Act, 1881, Schedule 1, Part I. - - - - 105
See Taxation of Costs. 2.

—— 1891 (18th January), LV., R. 4 - 489
See Condition in Will. 1.

—— —— LV., R. 4, sub-sects. (*a*) (*g*) - 374
See Infant.

—— —— LV., R. 11 - - - - - - 489
See Condition in Will. 1.

ORIGINATING SUMMONS — Infant — Advancement - - - - - - 374
See Infant.

OVERPAYMENT — Interest on mortgage — Credit against capital - - 78
See Mortgage. 4.

PARTIAL ADEMPTION - - 383
See Ademption.

PARTICIPATING POLICY — Trustee—Profits - - - - - - 255
See Trustee.

PARTITION—*Jurisdiction of Land Judge—Unincumbered share—Landed Estates Court Act, sections* 79, 81—*Right of unincumbered owner to delivery of order—Practice.*] Where, upon the petition of an incumbrancer on an undivided share of lands, an order for sale and partition is made by the Land Judge, the owner of an unincumbered share is entitled to delivery of the order for partition, allotting to him specific lands instead of his undivided share, although no sale has taken place. *In re Forster's Estate* - - - App. 213

—— Sale under order of Chancery Division—Land Law (Ireland) Act, 1896, s. 40 - 474
See Land Law (Ireland) Acts. 1.

PATENT—Reversion of the Crown - 377
See Land Law (Ireland) Acts. 3.

PAYMENT—Additional premiums by trustee—Participating policy—Profits - 255
See Trustee.

—— Interest on mortgage—Default in punctual payment—Overpayment—Credit against principal - - - - 78
See Mortgage. 4.

PERPETUITY—*Repair of enclosure round grave—Void gift.*] Bequest of £50 to be invested and the dividends to be applied in keeping the enclosure round a grave in order and repair *held* to be void. *Toole* v. *Hamilton* - - M. R. 383

—— Conditional legacy — Undertaking to keep grave in order—Moral obligation 394
See Charity. 1.

POLICY OF INSURANCE — Trust — Additional premiums paid by trustee—Participating policy—Profits - - 255
See Trustee.

POSSESSION OF LAND—Discontinuance of —Character of user - - - - 1
See Limitations, Statute of. 1.

POWER—*Execution—Joint power of appointment given to father and son—Contingent sole power of appointment given to son if surviving—Covenant by son to exercise sole power—Subsequent exercise of joint power by father and son—Defective execution of power—Mortgage subject to certain charges "so far only as they affect the land."*] By a disentailing deed, executed and enrolled in 1862, lands were limited to such uses as *A* and *B*, subject to the life estate therein of *A*, during their joint lives, should by deed appoint, and, in default of such appointment, to such uses as *B*, if he should survive *A*, should, after the death of *A*, by any deed made after the decease of *A*. appoint, and, in default of such appointment, to such of the uses of a certain settlement as were subsisting before the execution of the disentailing deed, under which *B* took an estate tail. In 1868, *B*, by a deed of arrangement with his creditors, covenanted that in case he survived *A*, and came into possession of the premises, he would grant and appoint the lands by way of mortgage to trustees to secure the sum of £2010, the aggregate sum due to his creditors. In 1872, *A* and *B*, in exercise of their joint power, mortgaged the lands (*A* conveying his life estate therein) to the petitioners, it being stated in the mortgage that the security thereby created was to be subject to several charges, including the sum of £2010 secured by the deed of 1868, "so far as the same are now subsisting and capable of taking effect, and so far only as they affect" the lands. In 1880, *A* and *B* in further exercise of their joint power, by deed mortgaged the lands to *M*, subject to the charges mentioned in the schedule to the deed (which included the deed of 1868), but not so as to give the same, or any of them, any greater or other priority, lien, or security than they respectively had. *A* having died in 1898:—*Held* (reversing the decision of Ross J.), by the Court of Appeal, that after the death of *A* the deed of 1868 took priority over the two mortgages of 1872 and 1880, though these latter deeds were executed under the joint power given to *A* and *B*. *In re Lambert's Estate*
[Ross, J., 12; App. 261

PRACTICE, CHANCERY DIVISION—Administration action—Costs of litigation in Queen's Bench Division, Probate—Priority - - - - - - 484
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PRACTICE, CHANCERY DIVISION—*continued.*

—— Administration action—Sale of mortgaged premises — Insufficiency of proceeds — Costs of sale - - - 466, 470
See Mortgage. 1, 2.

—— Company—Memorandum in lieu of contract —Leave to file - - - 340
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—— Equitable execution — Receiver — Delay in perfecting security—Stop order—Charging order - - - - - 511
See Charging Order.

—— Injunction.
See Injunction.

—— Land Judge — Conveyance — Prior sale of growing timber—Notice - - 122
See Land Judge's Conveyance.

—— Land Judge — Discretion — Withdrawal of estate—Land Law (Ir.) Act, 1896—Offers by tenants—Lapse of time - 248, 250
See Land Law (Ireland) Acts. 4.

—— Land Judge—Partition—Receiver appointed by Chancery Division—Land Law (Ir.) Act, 1896, s. 40 - - 474
See Land Law (Ireland) Acts. 1.

—— Land Judge—Partition—Unincumbered share of estate—Delivery of order - 213
See Partition.

—— Land Judge—Revenue—Duty on sale where superior interests are redeemed - 477
See Revenue.

—— Originating summons — Infant — Advancement—Question affecting next-of-kin
See Infant. [374

—— Proceedings on behalf of the Crown — Costs - - - - - 1
See Costs. 1.

—— Taxation of costs.
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—— Transfer of action - - - 346
See Transfer of Action.

PRACTICE, LAND COMMISSION—Alleged bias and prejudice of valuers—Evidence of—Admissibility - - - 274
See Evidence.

—— Sale—Reversion of the Crown—Acquisition of - - - - - - 377
See Land Law (Ireland) Acts. 3.

—— Superior interests—Redemption 377, 392
See Land Law (Ir.) Acts. 2, 3.

PREROGATIVE—The King suing by Secretary of State—Selection of Court - 346
See Transfer of Action.

PRESUMPTION—Advancement—Evidence to rebut - - - - - 360
See Trust.

PRIORITY—*Mortgage—Compromise of litigation in Probate Court—Costs of suit—Mortgage for costs.*] Decision of the Court of Appeal *sub nom, In re Bagot's Estate,* [1900] 1 I. R. 514–534, reversed, and judgment of Ross, J., *ibid.* 504–510 restored. *White* v. *Bagot* - - - - H. L. 529

—— Costs incurred in establishing will—Administration action - - - - 484
See Costs. 2.

—— Judgment creditor—Receiver—Delay in perfecting security—Stop order—Charging order - - - - - - 511
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—— Mortgage of tolls — Interest — Limerick Market Acts - - - - 530
See Merger.

PROBATE—Buying off opposition—Compromise of suit—Executors' liability - 404
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—— Costs incurred in establishing will—Priority —Consent - - - - 484
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PROFITS—Participating policy—Additional premiums paid by trustees - - 255
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RECEIVER—Appointed by Chancery Division—Land Law (Ireland) Act, 1896, sect. 40
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—— Appointed under Conveyancing Act—Bond—Right of action - - 301, 308
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—— Equitable execution — Delay in perfecting security—Stop order—Charging order
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RECTOR OF JESUIT ORDER — Legacy to, in aid of school managed by Order 394
See Jesuits.

REDEMPTION—Superior interest — Duty on sale - - - - - - 477
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—— Superior interest—Liability to indemnify
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—— Superior interest—Reversion of the Crown
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REGISTRATION—Contract with Company—Memorandum in lieu of—Leave to file—Practice - - - - 340
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—— Donation for charitable purposes—Revocation
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—— Equitable mortgage by banker - 172
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——Judgment mortgage—Affidavit sworn by one of two plaintiffs - - - 520
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—— Judgment mortgage—Share of next-of-kin
See Judgment Mortgage. 2. [429

RELEASE—Rentcharge—Conveyance—Costs
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REMOTENESS.
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RENEWABLE LEASEHOLD CONVERSION ACT - - - - 32, 36
See Fee-Farm Grant. 1, 2.

RENT—Arrears paid by incoming tenant—Fair rent
See Building Covenant. [441

—— Fair.
See Fair Rent.

RENTCHARGE—Release—Conveyance—Costs
See Taxation of Costs. 2. [105

REPAIR OF GRAVE—Bequest for—Perpetuity—Will - - - 383, 394
See Charity. 1.
Perpetuity.

REPAIR OF ROAD—Steam rollers—Injury to gas pipes - - - 492, 507
See Road.

RESIDENTIAL HOLDING—*Landlord and tenant—Land Law Acts,* 1881-1896—*Fee-farm grant made before* 1860—*"Though purporting to create the relation of landlord and tenant"*—*"Full agricultural rent"*—*Demesne lands.*] By a deed, executed in the year 1801, *A* granted, demised, set, and to farm let to his son-in-law *B*, his heirs and assigns for ever, the demesne, house, orchards, and garden of *K*, subject to a rent, which was secured by powers of entry and distress. There was a proviso that possession of the premises should not be given to *B* during the life of *A*, and a covenant by *B* to pay the rent. The description of the premises given in the deed, and in other documentary evidence, showed that the premises were residential in character at the date of the deed, though since much dilapidated and deteriorated:—*Held,* by the Court of Appeal (reversing the decision of the Irish Land Commission), that the premises were let to be used as a residence, and that the holding was excluded from the Land Law Acts. *Query*—Whether the deed of 1801 purported to create the relation of landlord and tenant. *Barton, Grantor*; *Fisher, Grantee* App. 453

RESIDUARY GIFT—Executory devise—Revocation of preceding gift 109, 116
See Revocation.

REVENUE—*Land Judge's Court—Practice—Duty payable on estate sold discharged of superior interests—Landed Estates Court (Ireland) Act,* 1858, *s.* 88—*Land Law (Ireland) Act,* 1896.] When land is sold in the Land Judge's Court to the tenants, and superior interests are redeemed, the duty payable under sect. 88 of the Landed Estates Court Act is on the balance of the purchase-money remaining after deducting the price of the redemption of the superior interests. *In re Garde's Estate, Braddell, Petitioner*; *In re Carew's Estate, Bagnell, Petitioner* - - - Ross, J., 477

REVERSION—Of the Crown—Sale under Land Purchase Acts - - - - 377
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REVOCATION—*Will—Construction—Substitutional gift—Revocation by codicil—Gift by implication.*] By his will, dated 19th October, 1867, *M* devised the lands of *N.* to trustees, upon trust to the use of his son *D. M.* and his heirs upon his attaining the age of twenty-six years, and in the meantime, and until his said son should attain that age, to apply the rents and profits for his maintenance. The will also contained a power of advancement. The will then provided that in case *D. M.* should die before he attained twenty-six, then from and immediately after his death to the use of the testator's eldest son *W. M.*, and the testator appointed his daughter residuary legatee and devisee. By a codicil dated the 15th July, 1868, testator revoked all the gifts in his will to *D. M.*, and in lieu thereof gave him a rentcharge charged upon all the testator's real estate in the county of *D.*, and the testator declared the same to be in full substitution of all absolute and reversionary interests to which his said son or his heirs would or might have been entitled under his said will, which the testator thereby confirmed in all respects, save in so far, and as to such parts thereof, as were thereby revoked. The testator died on the 8th February, 1899. At the date of the codicil *D. M.* was under twenty-six, but he attained that age at the date of the death of the testator:—*Held,* by the Court of Appeal (reversing the decision of the Master of the Rolls), that *W. M.* did not take any interest in the lands of *N.*, but that the same passed under the residuary clause in the will. *M'Kay* v. *M'Kay* - M. R. 109; App. 116

—— Deed of gift to charity—Registration 81
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RIGHT OF ACTION—Bond—Contract for benefit of third party—Receiver—Conveyancing Act, 1881 - - 301, 308
See Guarantee.

ROAD—*Repair of—Gas pipes—Use of steam rollers—Statutable rights—Injury to property in the exercise of such rights.*] The plaintiffs, a gas company, laid down pipes under the surface of certain roads, as they were entitled by statute to do, in order to supply gas for public and private purposes. The defendants were charged by statute with the duty of maintaining the roads in the county, and were for that purpose authorised to purchase or hire steam rollers. The defendants used steam rollers for the repair of the roads, but the rollers were so heavy as to frequently injure the plaintiffs' pipes, though they were laid at a depth sufficient to be safe from injury by the ordinary traffic and ordinary mode of repair, if such rollers had not been used:—*Held*, that the plaintiffs were entitled to an injunction to restrain the defendants from

ROAD—*continued.*
using steam rollers in such a way as to injure the pipes of the plaintiffs then properly laid under the roads, regard being had to what, at the time of the laying of the pipes, was the ordinary traffic, and reasonable means of repairing the roads. *Alliance and Dublin Consumers' Gas Co.* v. *Dublin County Council* - - - - M. R. 492; App. 507

SALE—By Land Commission—Dilapidations pending completion—Compensation to purchaser - - - - - 165
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—— By Land Commission—Subdivision of holding—Time - - - - - 163
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—— Land Judge's Court—Prior sale of growing timber—Notice - - - - 122
See Land Judge's Conveyance.

—— Land Judge's Court—Redemption of superior interests—Duty on sale - - 477
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—— Land Judge's Court—Withdrawal of estate—Adequate offers by tenants—Lapse of time—Judicial discretion—Appeal [248, 250
See Land Law (Ireland) Acts. 4.

SCALE—Compensation for disturbance—Letting for temporary convenience - 129
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—— Taxation of costs - - - - - 105
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SCHOOL—Managed by Jesuits—Legacy to rector in aid of - - - - 394
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SECRET TRUST—Will—Document found with - - - - - - 360
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55 Geo. 3, c. 104—Tippling, s. 15 - 239
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10 Geo. 4, c. 7—Roman Catholic Relief 394
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12 & 13 Vict. c. 105—Renewable Leasehold Conversion - - - - 32, 36
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18 & 19 Vict. c. 90—Costs in Crown Proceedings, s. 2 - - - - - 1
See Costs. 1.

21 & 22 Vict. c. 72—Landed Estates Court, s. 68
See Land Law (Ireland) Acts. 3. [377

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25 Vict. c. xxiii.—Limerick Market - 530
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33 & 34 Vict. c. 46—Landlord and Tenant, s. 3
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35 & 36 Vict. c. xcvi.—Limerick Market 530
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STEAM ROLLER—Injury to gas-pipes—Injunction - - - - 492, 507
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SUBDIVISION — *Landlord and Tenant—Land Purchase Acts—Sale of holding by Land Commission on subdivision—Time within which it may take place.*] The fact that more than twelve months has elapsed from the death of the proprietor of a holding which has thereby become subdivided, does not prevent the Land Commission requiring it to be sold under sect. 30 (1) (*d*) of the Land Law (Ireland) Act, 1881, and exercising the power of sale under that section. *In re Petticrew*
[MADDEN, J., 163

SUBMORTGAGE—Of uncalled capital—Winding-up—Notice - - - 38, 55
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SUBSTITUTIONAL GIFT — Will — Effect upon executory devise - 109, 116
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—— Redemption—Duty on sale - - 477
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—— Reversion of the Crown — Land Purchase Acts - - - - - - 377
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TAXATION OF COSTS—*Fees for* (a) *instructions for defence,* (b) *settlement of defence, and* (c) *settlement of interrogatories by senior counsel.*] Upon taxation of costs in an action brought to have a deed set aside, the Taxing Master (1) allowed £5 5*s.* for instructions for defence, and (2) disallowed fees to senior counsel for settling defence and settling interrogatories. Upon hearing of a summons to review the taxation, the Land Judge allowed senior counsel's fee for settling the defence, but disallowed the fee for settling the interrogatories, and he sent the matter back to the Taxing Master to reconsider the sufficiency of the sum allowed for instructions for the defence, having regard to the allowance of the fee to senior counsel for settling the defence. *Thompson* v. *Dignan*
[ROSS, J., 480

TAXATION OF COSTS—*continued.*
2. —— *Release of land from rentcharges on payment off—Purchase on sale.*] The lands of *A* and *B* were originally charged with certain rentcharges. By a settlement executed in 1878 the lands of *C* were charged with these rentcharges in indemnification of *A* and *B*. An action was brought to administer the real and personal estate of the owner of *C*, and in pursuance of the order of the Master of the Rolls a petition for the sale of *C* was presented. An arrangement having been come to with the owners of the rentcharges for their redemption out of the proceeds of the sale of *C*, the Master of the Rolls approved of it, subject to title being shown to them; and that title was subsequently approved of. The Land Judge directed that the lands of *C* should be sold discharged from the rentcharges; that the owners of the rentcharges should be put on the Final Schedule of Incumbrances for the amount of the redemption price; and that they should execute a deed of release of *A* and *B* from the rentcharges at the expense of *C*. This deed was stamped as a conveyance: — *Held*, on appeal from the Taxing Master, that the deed was a conveyance; and that the costs should be taxed under Schedule 1, Part 1, to the General Orders, under the Solicitors' Remuneration Act, and not under Schedule 2. *In re Conolly's Estate; Scottish Provident Institution, Petitioners* - - - - - ROSS, J., 105

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TIMBER — Sale of — Subsequent Land Judge's conveyance—Purchaser with notice 122
See LAND JUDGE'S CONVEYANCE.

TIME—Sale of holding by Land Commission—Subdivision - - - - - 163
See SUBDIVISION.

TIPPLING ACTS—Consideration for mortgage partly avoided by - - - 239
See MORTGAGE. 3.

TOLLS—Mortgage—Priority—Interest—Merger
See MERGER. [530

TRADING BY WIFE—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75, *s.* 17)—*Question between husband and wife as to property—Order restraining husband from interfering with business carried on by wife.*] A woman was possessed of a licensed public-house, in which she lived and carried on business. On her marriage the house and business remained her separate property, and the husband agreed not to interfere with the business. The husband lived in the house with his wife. Subsequently he ill-treated her, and

TRADING BY WIFE—*continued.*
systematically interfered with the business, and acted as if he were owner of it, to the serious detriment of the business. The Master of the Rolls on the hearing of an originating summons brought by the wife against the husband under sect. 17 of the Married Woman's Property Act, 1882, made an order declaring the wife entitled to the property, and restraining the husband from interfering with the business, but declined to make any order preventing the husband from entering the house. *Gaynor* v. *Gaynor* - - M. R. 217

TRANSFER OF ACTION—*Practice—Action by principal against agent for fraudulent misrepresentation, accounts, and for neglect—Transfer to King's Bench Division—The King suing by Secretary of State.*] An action was brought in the Chancery Division by the Secretary of State for War against *S.* for damages for fraudulent breach of duty in inducing the Government to make excessive payments for horses purchased by him as purchasing agent, for fraudulently misrepresenting the prices at which they were purchased, for negligent conduct in purchasing horses unfit for service, and for an account of all profits made as such agent. There were five other defendants against whom damages were claimed for conspiracy in assisting in the fraudulent acts. Two of the defendants moved to transfer the action to the King's Bench Division, and Chatterton, V.-C., granted the application:—*Held*, that, without deciding the question of a prerogative right in the Crown to choose in which Court it will proceed, the action could be more conveniently tried in the Chancery Division. *Secretary of State for War* v. *Studdert* - - - - - - App. 346

TREES.
See Timber.

TRUST — *Will — Construction—Document found with will—Secret trust—Beneficial gift or trust—Husband and wife—Advancement—Presumption—Rebutting evidence—Estoppel.*] A testator bequeathed all his real and personal estate "for the use of my wife *M.*, her heirs, executors, or administrators respectively upon trust that she my wife *M.* . . . shall thereout in the first place pay my funeral expenses and debts (if any), and in the next place my testamentary expenses and debts, and in the next place do all things I have requested of her at my decease. I appoint my wife *M.* to be one of my executors or executrix and administrator of this my will." Then followed a proper attestation clause. And the testator appointed *C.* "as one of my executors." Probate was granted to the widow *M.*, the other executor having renounced. There was no real estate. At the date of testator's death £600 bonds (valued at £667) were standing in the names of the testator and his wife, representing stock mainly purchased by the testator out of his own money, and were stated in an affidavit made by her as executrix for purposes of probate to be part of the assets of her deceased husband, the net value of which was £991. In a document found with the will after the death of the testator these £600 bonds were mentioned by testator as his property, and the document stated that it was drawn up in the presence of his wife *M.*, she agreeing to pay the sums mentioned in it to certain named persons and the treasurers of certain charitable organizations. These gifts would have exhausted the assets. This document was signed by testator. It was signed by *M.* without knowing the contents thereof, though at the time she knew it had something to do with the disposition of testator's property. Testator at the time of signing told *M.* to pay four sums of money to four persons (whose names and the sums directed to be paid to each, respectively, were mentioned in the document of 1899), and she agreed to do so. These sums amounted in all to £120. No other request as to disposition of the property was made to *M.* The document was signed by *C.* as witness. *Held*, 1. That under the circumstances of the case the £600 bonds belonged to the widow *M.* by survivorship, the presumption of advancement not having been rebutted. 2. That under the provisions of the will *M.* took a beneficial interest in all the personal estate of the testator, subject to the payment of debts, etc., and subject to a secret trust for the payment of the four sums she agreed to pay when so requested by the testator. *Morrison* v. *M'Ferran* - - - - - - M. R. 360

—— Execution of, by Court—Equality equity 437
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—— Moneys of deceased person—Executor paying same into credit of his personal banking account—Notice - - - - 222
See Banker. 2.

—— Policy of insurance—Additional premium paid by trustee—Profits - - 255
See Trustee.

TRUSTEE — *Policy of insurance — Security—Addition to value of policy—Payment of additional premium by trustee out of his own money—Participating policy—Profits.*] A trust fund of £1000 was put in settlement on the marriage of *T.*, who took a life estate therein. The trustees of the settlement, who had very wide powers of investment, lent the trust fund to *T.*, who gave his bond and warrant of attorney, and contracted to insure his life for £1000. He also, by deed, directed and appointed that the trustees should, during his life, stand possessed of an annual rentcharge of £50 in the first place for the payment of premiums. No policy of insurance for £1000 was effected, but instead thereof there were two separate policies for

TRUSTEE—*continued.*

£500 effected. One of the trustees of the settlement, out of his own money, paid for several years an additional £1 annual premium on one £500 policy, and thus converted it from a policy without profits into a participating policy, and so entitled to profits or bonus. After the death of *T.* there were profits or bonus to the amount of £326 paid in respect of this £500 policy:—*Held,* that the sum of £326 representing profits or bonus did not belong to the *cestuis que trust* under the settlement of 1846, but went to the representative of the trustee who had paid the additional £1 annual premium. *Bagnall's Trusts*; *Flynn* v. *Dalgleish* - M. R. 255

—— Compromise—Trustee Act (1893) s. 21 404
See Executor.

VALUERS — Land Commission — Fair rent — Bias and prejudice — Evidence of — Admissibility - - - 274
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WIFE.
See Husband and Wife.

WILL — Bequest of residuary estate of third person — Receipt and partial user by testator—Partial ademption - 383
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—— Condition — Annexed to devise — Personal liability of devisee - - - 489
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—— Condition — Becoming illusory — Trust carried out by Court — Equality equity [437
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—— Executor — Compromise of Probate suit — Buying off opposition — Insufficiency of assets—Liability - - - 404
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—— Executor — Costs incurred in establishing will—Priority—Consent - 484, 529
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—— Revocation — Implied gift — Substitutional gift - - - - 109, 116
See Revocation.

—— Secret trust - - - - - 360
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—— Substitutional gift — Effect upon executory devise - - - - 109, 116
See Revocation.

WINDING-UP — *Company — Mortgage of uncalled capital— Winding-up order—Sub-mortgage of mortgage fraudulent against contributories—Notice of winding-up, but no notice of fraud—Assignee of chose in action taking subject to equities*]. A mortgage of the uncalled capital of a company was given by the directors to the promoter's wife (whose name was used in the deed, at his request and for his convenience), to secure £3409, alleged to have been advanced for the company. The circumstances under which this mortgage was executed were such that the Court decided that it was as to £1350 (portion of the principal thereby secured) fraudulent as against the shareholders. The promoter's wife obtained an advance of £2750 by executing a sub-mortgage to *W.*, who had no notice of the fraud affecting the transaction, though he was aware that the company had been ordered to be wound up in hostile proceedings:—*Held* (reversing the decision of the Master of the Rolls), that once the winding-up order was made all the then uncalled capital, so far as not validly otherwise appropriated, became devoted to the payment of the general creditors, and that W., claiming under the sub-mortgage with notice of the statutory appropriation of all the uncalled capital, could not get against the company a title higher than that of the mortgagee under whom he derived. *In re Gwelo* (*Matabeleland*) *Exploration and Development Co., Limited*; *Williamson's claim* - - M.R. 38; App. 55

—— Debentures — Equitable deposit — Set off by Company of claims against registered holder - - - - - 73
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—— " Every year "—Mortgage - - 78
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—— " Purporting to create the relation of landlord and tenant," 59 & 60 Vict., c. 47, s. 14 (*b*), - - - - - 453
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—— " Wishing to return and settle in native country "—Will - - - 489
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THE END.

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